Law's Erotic Triangles: A Conversion, Inversion, and Subversion

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ABSTRACT

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The erotic triangle, in which two men compete for a desired woman, is a foundational archetype of Western culture. This dissertation, through its three separately-published articles, examines how this cultural archetype is manifested in law and legal structures, and the relationship between law's erotic triangulations, gender inequality, and third-party responsibility. Each of the three articles of this dissertation focuses on a different manifestation of third-party responsibility, and each offers its own self-contained argument. At the same time, the "graphic schema" of the erotic triangle analytically enriches each of them.[1] The erotic triangle is a "sensitive register […] for delineating relationships of power and meaning," and using it in this context illuminates the shifting ways gender, power, and legal responsibility circulate in these male-female-male legal structures.[2] Together, the articles suggest that law both replicates and reproduces erotic triangulations in ways that contribute to gender inequality, but also that it may be an important site for their renegotiation.

The first article, *A New Tortious Interference with Contractual Relations: Gender and Erotic Triangles in Lumley v. Gye*, explores how the tort of interference with contractual relations was created out of a factual scenario involving an erotic triangle (two rival opera-house managers competing for the services of a renowned chanteuse). The court *converted* past regulations of erotic triangles (in particular, criminal conversation, which allowed a husband to bring an action against a man for sexual interference with his wife) into a new cause of action, one which removed a triangulated woman's responsibility for breaching a contract, and instead

[1] Sedgwick, *supra* note 3, at 21.
[2] *Id.*

assigned responsibility to the man who induced her to breach. While this first iteration involves the removal of responsibility from a triangulated woman, the second article, *Home Rules*, involves an *inversion* of this responsibility allocation: here responsibility is removed from a usually *male* wrongdoer and instead imposed upon a triangulated woman. *Home Rules* examines how, through a series of ordinances, local governments are imposing responsibility on female heads of household for the wrongful actions of their typically male household members. In so doing, local governments disrupt kinship structures and assert the state's dominance over the family and intimate life. The third article, *Triangulating Rape*, evidences a more positive shift in responsibility. It traces the transformation of rape law as a progression from a tradition of erotic triangulation to a *subversion* thereof. Unlike the historical rape law triangle, in which rape is legally constructed as a wrong that one male does to another through the body of a woman; and unlike the criminal rape law triangle, in which rape is legally constructed as a wrong that one man does to the state through the body of a woman; civil actions in which women bring claims against both perpetrators of sexual assault and the third-party entities that facilitate or fail to prevent those assaults allow harmed women to assert their own subjectivity and climb out of their traditionally passive role in the erotic triangle. In so doing, this reconfigured triangulation ultimately challenges the gender status quo that produces sexual harms, and suggests that subverting the usual functioning of triangulated patterns may hold promise as a tool of social change.

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INTRODUCTION

The erotic triangle, in which two men desire the same woman, is a foundational archetype of Western culture. Featured prominently in cultural productions ranging from classic, high-brow Greek tragedies like Aeschylus's *Agamemnon*, to contemporary, low-brow popular culture book and film series like *Twilight*, these triangles are woven deeply into our cultural narratives and collective imagination.[3] They appear in every conceivable era and in every conceivable genre, from soap operas to Shakespeare, creating compelling narratives and shaping stories of desire, deception, and rivalry.[4]

In *Between Men: English Literature and Male Homosocial Desire*, Eve Kosofsky Sedgwick uses nineteenth-century literary examples to show the circulations of gender, desire, and power in these triangles.[5] She reveals that these triangles are premised not on a love relation between each man and the woman, but on the bond between the two rivaling men.[6] Sedgwick terms the bond between the two men *homosocial*, by which she means to encompass the entire spectrum of social to sexual desire, including desire manifested in negative ways, like hatred and domination.[7] While male-male sexual desire is part of the story of these triangulations, they are also about how men solidify power between them, and about how men seek power over each other "in historically variable ways, using age, class, race, homophobia, knowledge, pathos, wit,

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[3] *New York Magazine* declared 2010 to be "The Year of the Onscreen Love Triangle," citing movies like *The Twilight Saga: Eclipse* and HBO's television series *True Blood* as examples. Kyle Buchanan, *The Year of the Onscreen Love Triangle*, N.Y. MAG. (Dec. 29, 2010, 3:15 pm), http://nymag.com/daily/entertainment/2010/12/love_triangles_slideshow.html.

[4] Freud's Oedipal triangle is another well-known cultural totem. See SIGMUND FREUD, THE INTERPRETATION OF DREAMS (A.A. Brill trans., 1913).

[5] EVE KOSOFSKY SEDGWICK, BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE (1985).

[6] *Id*. Of course, gender is a much more complicated concept than this Introduction suggests. For the purpose of this structural analysis, though, reductionist categories function as sufficient placeholders.

[7] *Id*.

and [most importantly for our purposes], women."[8] The woman's function is to triangulate the relationship between the men, to serve as a "suture"[9] or "conduit"[10] between them. She is thus essential to the "calculus of power" that forms between the rivalling men, but also excluded from its benefits.[11] Her exclusion from this "calculus of power" has political implications; the status of women is deeply connected to and "inescapably inscribed" by the structure of these triangles.[12]

Erotic triangles, then, are more than just a mere plot device. Their prevalence and endurance in Western cultural productions connects to the presence of these male-female-male gendered patterns in structures and situations in society more broadly. Sedgwick's theorization builds on Claude Levi-Strauss's anthropological study of primitive societies, where he observed that the erotic triangulation of marriage, in which one man gives a daughter or other woman to another man, is a foundational structure of society.[13] Sociology and masculinities studies have also used these gendered structures to explain the contemporary construction of masculine identity and male relations.[14] Feminists have described how war is an exploded erotic triangle, and the rape of women in war can be seen as a method of fighting between the two men.[15] As these examples of marriage and war make clear, male-female-male triangles are both sites of joining together

[8] SHARON MARCUS, GEN/TEN: EVE KOSOFSKY SEDGWICK'S BETWEEN MEN AT 30, 2 (2015) https://academiccommons.columbia.edu/download/fedora_content/download/ac:190398/CONTENT/MarcusBetweenMenAt30AC.pdf.
[9] Victoria Wohl, INTIMATE COMMERCE: EXCHANGE, GENDER, AND SUBJECTIVITY IN GREEK TRAGEDY 11 (1998).
[10] Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex, in* TOWARD AN ANTHROPOLOGY OF WOMEN 157, 174 (Rayna R. Reiter ed., 1975).
[11] Sedgwick, *supra* note 3, at 21.
[12] *Id.* Gender is of course a much more complicated concept than this Introduction's categorical use of terms would suggest. Nevertheless, for the purposes of this structural analysis, the terms function as a useful shorthand.
[13] CLAUDE LEVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 61 (Rodney Needham, ed., James Harle Bell & John Richard von Sturmer trans., 1969).
[14] See, for example, Michael Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity, in* THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY 25 (Michael S. Kimmel ed., 2005).
[15] See, for example, Robyn Wiegman, *Unmaking: Men and Masculinity in Feminist Theory, in* MASCULINITY STUDIES & FEMINIST THEORY: NEW DIRECTIONS 42 (Judith Kegan Gardiner ed., 2002).

and of ripping apart, of power consolidation and of mutual destruction. They are profoundly contested nodal sites of potential power transfer or usurpation.[16]

This dissertation argues that erotic triangles exist in law, too, and can serve as a revelatory rubric for analyzing certain forms of third-party responsibility. Each of the three stand-alone, separately-published articles of this dissertation focuses on a different manifestation of third-party responsibility, and each offers its own self-contained argument. At the same time, each article's exploration of third-party responsibility is analytically enriched by the "graphic schema" of the erotic triangle.[17] The erotic triangle is a "sensitive register […] for delineating relationships of power and meaning," and using it in this legal context illuminates the shifting ways gender, power, and legal responsibility circulate in these male-female-male structures.[18] It demonstrates that variations in responsibility can nevertheless produce the same effect: triangulated women end up elided or "'diminished,' albeit in in different ways and by different means."[19] Together, the articles suggest that law both replicates and reproduces erotic triangulations in ways that contribute to gender inequality, but also that it may be an important site for their subversion.

Each of the three articles of this dissertation offers a different variation on the erotic triangle: a conversion, inversion, and subversion. The first article, *A New Tortious Interference with Contractual Relations: Gender and Erotic Triangles in Lumley v. Gye*, shows how a court created a new tort through the *conversion* of already-existing causes of action involving erotic triangles into a new cause of action. The second article, *Home Rules*, shows an *inversion* of the

[16] Wohl, *supra* note 7, at 21.
[17] Sedgwick, *supra* note 3, at 21.
[18] *Id.*
[19] Marcus, *supra* note 6, at 6.

gendered notions of responsibility that informed the *Lumley v Gye* tort; rather than *too little* responsibility on a triangulated woman, the problem in *Home Rules* is one of *too much*. The third article, *Triangulating Rape*, shows a *subversion* of the erotic triangle, and suggests that subverting the usual functioning of these triangulated patterns may hold promise as a tool of social change. While "[m]any of the gender asymmetries that shaped women's lives when Sedgwick wrote in 1985 and that she traced across three centuries of English literature" unfortunately still persist "thirty [one] years later," the subversion in *Triangulating Rape* suggests a means of possibly overcoming this legacy.[20]

Converting the Erotic Triangle: A New Tortious Interference with Contractual Relations: Gender and Erotic Triangles in Lumley v. Gye

The first article of this dissertation, *A New Tortious Interference with Contractual Relations: Erotic Triangles and Gender in Lumley v. Gye*, describes how erotic triangles have long been part of our legal narrative. Ancient Roman law, for instance, incorporated the understanding that relationships between men are often triangulated through women (and through certain other men occupying the lower ranks of the patriarchal hierarchy).[21] In the Roman system, the *paterfamilias*, or head of the household, could bring a legal action for violence or insults inflicted upon his wife, children, or slaves.[22] Such violence or insults were understood to be "only another form of insult to the *paterfamilias* himself."[23] In other words, one man would get at

[20] Marcus, *supra* note 6, at 8.
[21] Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663 (1923).
[22] *Id.*
[23] *Id.*

another indirectly, through a member of his household, and the law would provide a means of remedying that wrong.[24]

By the mid-thirteenth century, the idea that one man may strike at another through the body of a third person had been incorporated into English law.[25] A lord could bring two types of actions against a person who harmed the members of his household: one for the loss of services he suffered when a dependent member of his household was injured, and the second for the insult to him.[26] In this second type of action, although the physical harm was inflicted on the body of another, the law interpreted that as an insult to the lord himself.[27]

When William Blackstone, in the eighteenth century, wrote of the "three great relations" of English life, each of these three relationships (master-servant, father-child, and husband-wife) was specifically protected against the kind of injury and insult described above.[28] Enticement offered compensation if one man "stole" another's servant, seduction offered compensation if one man "stole" another's daughter, and criminal conversation offered compensation if one man "stole" another's wife through sexual intercourse.

Criminal conversation, like enticement and seduction, was a "classically homosocial structure."[29] The wrong was framed as "between the two men," with the wife's function in the case as purely that of "contested object."[30] Her "'consent' to the adultery – her willingness,

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[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 664.
[28] Lea Vandervelde, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, 101 YALE L. J. 775, 789 n. 62 (1992) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 410 (1765)).
[29] LAURA HANFT KOROBKIN, CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY 51 (1998).
[30] *Id.*

aggression, emotional involvement," or, in other words, her potential joint *responsibility* for it was "legally irrelevant" and "outside the [cause of action's] narrative boundaries."[31]

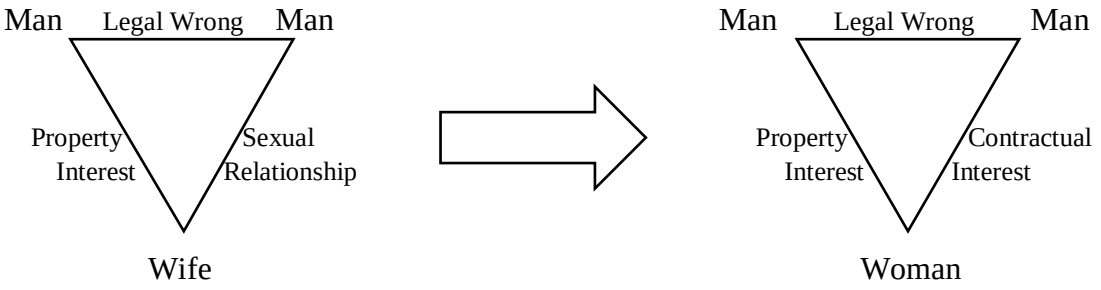
Initially, criminal conversation was rooted in a loss of services: loss of consortium allowed a cuckolded husband to bring an action against his wife's lover for damages on the basis that the lover had deprived him of his wife's services.[32] Later, loss of consortium gave rise to a separate tort of criminal conversation, and criminal conversation dropped the requirement that the injury be framed in this way.[33] The tort treated the adultery as a trespass and injury in itself, as a "figurative rape of man by man," with a special focus on the husband's emotional injury, inflicted upon him by another man through the medium of his wife.[34] Trivial losses of service triggered large damage awards for cuckolded husbands, to compensate this sense of dishonor.[35]

In *Lumley v. Gye*, the court *converted* these prior regulations of gendered triangular conflicts into a new cause of action: the tort of interference with contract relations. Prior to *Lumley v. Gye*, no court had held that procuring a breach of contract could constitute a tort. The only procurement cases were those just described, involving servants, daughters, or wives. However, when Benjamin Lumley and Frederick Gye came before the court, the familiar gendered structure of their rivalry invoked these past precedents. Benjamin Lumley and Frederick Gye were long-avowed rivals and managers of competing opera houses. Lumley ran Her Majesty's Theatre, which was in the fortunate position of serving as the main forum for Italian opera in London until Covent Garden, which Gye managed, opened in 1847.[36] The opera houses sparred

[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] S.M. Waddams, *Johanna Wagner and the Rival Opera Houses*, 117 LAW. Q. REV. 431 (2001).

for many years, but the rivalry was not simply a business one. Gye's diary describes his personal animosity with Lumley, and that Lumley threatened "there would be war to the knife & [Lumley] would crush [Gye] and Covent Garden too!!!"[37] Their rivalry crescendoed over the singing services of Joanna Wagner, with Lumley arguing that Gye persuaded her to breach her contract to sing at Her Majesty's Theatre, and to instead sing at his Covent Garden.

Because the Lumley-Gye-Wagner dispute so closely resembled these other legal regulations of male-male-female erotic triangles, the court interpreted it in a way that conformed with these legal precedents. The court created a legal link between the two men where none was before, adding a legal layer to the social and competitive bond that already existed between them. Building on the actions of enticement, seduction, and criminal conversation, the court found that Gye's persuading Wagner to enter into a contractual relation with him was an attempt to insult and injure Lumley. The court read the allegation that Gye somehow "took" Wagner from Lumley as an allegation that Gye had behaved in a way that transgressed the normal bounds of competition and threatened another man's status, just as criminal conversation or seduction would have done.



[37] *Id.*

In creating this tort, the court ignored Johanna Wagner's responsibility for her own breach of contract. Like the wife in a criminal conversation action, she became "legally invisible."[38] Responsibility was removed from her, and placed onto the rivalling male, making him liable for her contractual breach. By eliding her responsibility for the breach, the court denied Johanna Wagner's autonomy and full legal personhood. Because her gender and its connection to these previous causes of action made her appear as a less-than full market participant, the court created a tort which ignored her role in her own contractual breach, and assigned too little responsibility to her.

Inverting the Erotic Triangle: Home Rules

Whereas the first article in this dissertation concerns the *conversion* of old causes of actions rooted in erotic triangles into a new tort that removed responsibility from the triangulated woman, the second article, *Home Rules*, involves an inversion of that responsibility allocation. The problem in *Lumley* was that there was not *enough* legal responsibility placed on the triangulated woman: the tort ignored her existence as an autonomous person, and left her out of the relevant legal story. *Home Rules*, however, shows the opposite problem: one of *too much* responsibility.

Home Rules explores the phenomenon in which thousands of American cities and towns are passing ordinances that hold individuals responsible for the wrongful acts of their family members and friends, in the hopes that such ordinances will curb social problems like bullying, drug abuse, and criminality. The article focuses on three types of these ordinances. First, parental liability ordinances impose sanctions on parents when their children engage in bullying

[38] IVY SCHWEITZER, PERFECTING FRIENDSHIP: POLITICS AND AFFILIATION IN EARLY AMERICAN LITERATURE (2006).

or other targeted behaviors. Second, crime-free lease ordinances impose mandatory terms in rental housing leases that require the eviction of tenants whose family members, friends, or guests engage in unlawful acts. Third, nuisance ordinances require evictions when a threshold number of calls to police is exceeded, even though such calls are often related to another person's wrongful or abusive behavior.

Although these ordinances sound gender-neutral, in operation they sanction mainly women: the demographics of parenting, household organization, and home ownership mean that women bear the brunt of these ordinances. Most single-parent households are headed by women, and "female-headed households are more than twice as likely to rent as the general population."[39] Poor black women are particularly affected. One study of nuisance citations in Milwaukee revealed that "[p]roperties in black neighborhoods disproportionately received [nuisance] citations."[40] Out of the 503 properties deemed nuisances, 319 were located in black neighborhoods, and an additional 124 were located in black-majority neighborhoods.[41]

While women bear the brunt of the home rule ordinances, male household members are most likely to trigger them. Most crime is perpetrated by males, as acknowledged by the "gender crime gap," and they are more likely to engage in the kinds of behaviors and attract the kind of law enforcement response that set these ordinances in motion.[42] It is usually the drug activity of

[39] EMILY WERTH & SARGENT SHRIVER, NAT'L CTR. ON POVERTY LAW, THE COST OF BEING "CRIME-FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 5 (2013).
[40] Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner City Women*, 78 AM. SOC. REV. 117, 119 (2013).
[41] *Id.*
[42] See, for example, Jessica Abrahams, *Are Men Natural Born Criminals? The Prison Numbers Don't Lie*, THE TELEGRAPH (January 13, 2015) http://www.telegraph.co.uk.

"an adolescent or young adult male child or grandchild," or the wrongdoing of a male intimate partner, that triggers these local laws.[43]

Thus, these ordinances ordinarily function to hold female heads of household responsible for the actions of their male household members. In *Lumley v Gye*, to make its legal move, the court relied on precedents in which a male head of household had a cause of action against another man who harmed his dependents. The flip side of the right to bring such a cause of action was that if that *dependent* were to harm someone, the male head of household could be vicariously liable.[44] Under the law of coverture, for instance, a husband was legally responsible for any petty crimes or torts committed by his wife, since it was presumed that she acted at his behest, and he was understood as acting through her.[45] Thus, historically, both harms done *to* a third-party female dependent, and harms done *by* a third-party female dependent were configured as happening to and by the male head of household.

Home Rules inverts this responsibility allocation. Instead of a *male* head of household being held legally responsible for the wrongs done by his dependent female household members, *Home Rules* describes how local ordinances operate to hold *female* heads of household responsible for the wrongs done by their typically male household members. Ironically, this inversion, which resurrects this presumed-defunct form of vicarious liability, and replaces *not enough* responsibility with *too much*, still manages to produce the same gender hierarchy: the legal rights and obligations of triangulated women are once again tied too tightly to their relationship with men. Their legal salience once again depends on their relationship with a male:

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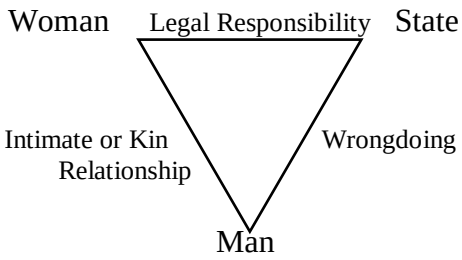
[43] Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. OF GENDER, RACE & JUSTICE (2002).
[44] S.E. *Liability of a Husband for the Torts of his Wife*: 83 U. PENN. L. REV. 66, 66 (1934).
[45] *Id.*



In this triangulation, women are held legally responsible for the wrongdoing of their male intimate partners and kin, even though they may have no knowledge of the unlawful activity nor any ability to control it. The state leverages the bonds that dominate the "complex social unit" of a family – "hierarchical, erotic, competitive, affective" – in order to coerce compliant behavior of both a potentially misbehaving men and a triangulated women.[46] The state occupies the position of a rival male in this triangulation, a fine fit, since "the state is in almost all cases male dominated and is in different ways a masculinist construct."[47] And it, too, has desires, and a will made manifest through law.[48]

With these ordinances, the state wants women to control the actions of potentially wrongdoing men. In so doing, the state also seeks to absolve *itself* of responsibility for addressing crime and violence. This is most obvious in the context of nuisance ordinances triggered by domestic violence. One landlord (now functioning as a state agent) describes how nuisance ordinances have led him to admonish his female tenants for trying to achieve a desired state intervention into their relationships. He recounts, "Like I tell my tenants: You can't be

[46] JULIE REBECCA SCHUTZMAN, RULING PASSIONS: SOVEREIGNTY, FEMININITY AND FICTION 1680-1742 12 (1999) (unpublished dissertation, University of Pennsylvania), http://repository.upenn.edu/dissertations/AAI9953591/.
[47] Jan Jindy Pettman, *Women, Gender, and the State, in* INTRODUCTION TO WOMEN'S STUDIES: GENDER IN A TRANSNATIONAL WORLD 174 (Emily Barrosse ed., 2006).
[48] JUDITH BUTLER, UNDOING GENDER 111 (2004).

calling the police because your boyfriend hit you again. They're not your big babysitter."[49] The landlord then goes on to suggest that familial erotic discord is at the root of domestic abuse, warning "Don't take him back and get hit because you tell him, I don't know, 'I don't want to sleep with you.'"[50] Here, women are understood as responsible for their own abuse; the state has volleyed responsibility for stopping domestic violence onto the women who experience it.

At the same time as it denies *wanted* interventions and diverts responsibility for male wrongdoing onto female heads of household, the state makes significant *unwanted* interventions into familial and intimate relations. The predecessor to crime-free ordinances, the "one-strike policy" in public housing, dramatically demonstrates the impact of these kinds of laws on intimate life. "Describing a public housing project in southeastern North Carolina," one sociologist noted that just outside the projects, "a small number of African-American men would routinely assemble each morning at a street corner to wait for their girlfriends or wives, who were residents of a nearby housing project, to leave their apartments and cross the street to visit them."[51] It turned out that the men "who had been accused, arrested, or convicted of various criminal infractions, were barred from stepping foot on the project."[52] For their female companions, "the cost of permitting them to visit or stay the night was possible eviction" under the one-strike policy."[53] The possibility of the woman's eviction is meant to police male behavior, and to assert the state's dominance over him both directly and indirectly, through her. The home represents a "realm of privacy from other men for men," and its symbolic infiltration

[49] Desmond, *supra* note 38, at 131.
[50] *Id.*
[51] Christopher Mele & Teresa A. Miller, *Introduction, in* CIVIL PENALTIES, SOCIAL CONSEQUENCES (Christopher Mele & Teresa Miller eds., 2005).
[52] *Id.*
[53] *Id.*

and the subsequent ousting of the wrongdoing man from it is an assertion of state power over him.[54]

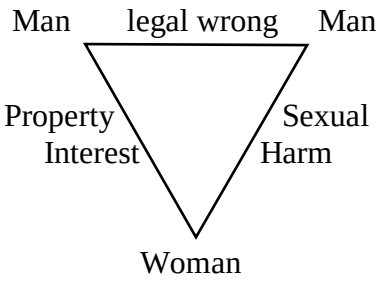
Subverting the Erotic Triangle: Triangulating Rape

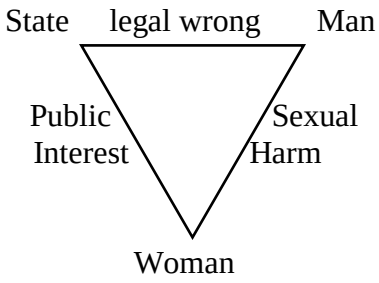
The first article of this dissertation shows a *conversion* of old status-based homosocial triangles into the more modern world of contract. The second shows an *inversion* of that triangulation: instead of a triangulation which removed responsibility from the triangulated female, the triangulations in *Home Rules* put an excess of responsibility on her. The final article of this dissertation, *Triangulating Rape*, describes a subversion of these erotic triangles and their disordered responsibility allocations. *Triangulating Rape* suggests that it may be possible to *re-triangulate* responsibility in ways that have emancipatory potential.

Triangulating Rape begins by describing how, historically, rape law was a classically homosocial structure. It was structured as a legal wrong between two men: one man's rape of another man's wife, daughter, or servant would be legally constructed as a wrong done to him. This framework positioned men as legal subjects, and the harmed woman as the object of dispute, and thus was both constituted by and constitutive of patriarchy.[55]

Eventually, this patriarchal triangulation gave way to a new triangulated form: that of the criminal law. Like the historical structure of rape law, the criminal law also triangulates rape.

[54] WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 185 (1995).
[55] Sarah L. Swan, *Triangulating Rape*, 37 N.Y.U. REV. L. & SOC. CHANGE 403 (2013).



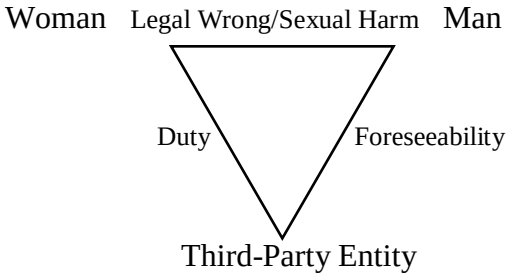


In the criminal law triangulation, though, the triangulation is between the state, a male defendant, and a harmed woman. Here, the state takes the position previously held by the patriarchal male, and the state and the harmed woman are linked not by a proprietary interest, but through the public interest. The public interest performs a similar function to the proprietary one: it also "de-emphasizes the personal effect of the crime on the victim," and instead emphasizes "the wrong to society."[56] The historical triangulation and the criminal triangulation have many other points in common. Both schemas largely ignore the harmed woman's desire to engage in the legal process. In both forms, the woman's role in the legal proceeding is overshadowed by that of the male participants. In the criminal triangulation, the state, in assuming the responsibility of prosecuting the accused, is acting in a paternal manner similar to the old patriarchal figure. And, "the result is a triangulation that both reflects a particular gender order and contributes to the structuring of that order."[57] The criminal triangulation has not effectively addressed rape and sexual assault, and its failure to do so "ensures that the existing gender structure of society continues."[58]

[56] *Id.* (citing Lea Vandervelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 828 (1995).
[57] *Id.*
[58] *Id.*

Now, a new, potentially emancipatory structure of rape law is emerging. Since the 1970s, women have increasingly been bringing triangulated *civil* claims for sexual assault. Female plaintiffs are bringing claims against both individual perpetrators and the third-party entities that facilitated or failed to protect against the sexual assault. These claims allege negligence against that the businesses, schools, hospitals, cruise ships, landlords, and other entities that created the environments in which these wrongs took place, or negligently allowed perpetrators access to victims.

In this new triangulated form, the harmed woman moves into the position originally held by the patriarchal male, and then by the state. She is "connected to the third party not through another person's proprietary interest, or through the state's public interest, but through a duty owed to her under negligence law."[59]



Further, "whereas in each previous triangulation the person who experienced the sexual harm was disconnected from the assertion of the legal wrong, in this civil triangulation the legal wrong and sexual harm are finally bound together. In this triangulation, the harmed woman is configured as a full legal and political subject, empowered in her interaction with the defendants, able to narrate her own claim, and potentially able to achieve a remedy that is meaningful to

[59] Swan, supra note 53, at 425.

her."[60] Moreover, she is able to complicate the wrong itself, to implicate entities and institutions in the occurrence of sexual violence. In so doing, these triangulated subversions ultimately challenge the gender status quo that produces sexual harms, and suggest a path forward for other triangulated subversions as well.

Subverting erotic triangles is possible because they are at their core unstable. While they work to reify and uphold an unequal gender system, they also provide a moment of potential contestation. The exchange of women is a "nodal point of hegemonic negotiation."[61] It is "a site at which power is articulated through a condensation of certain class relations, gender relations, and subject positions. But because this articulation is contingent and provisional (not essential or inevitable), it contains the possibility of endless rearticulations. The exchange thus can be oppressive and hegemonic, reconfirming gender inequality and a world owned and ruled by male subjects; but at the same time it is potentially subversive, constantly calling attention to its own exclusions and violences, and laying open to critique the society and subjectivities founded upon it."[62]

* * *

Together, these three moments of conversion, inversion, and subversion are meant to "register volatility and variation" in law's erotic triangulations and to highlight the tenacity of this gendered pattern,[63] but also to suggest the possibility of a reordering. If women serving as the "suture" between men, and between men and the state, helps to "generat[e] and defin[e] an entire

[60] *Id*.
[61] Wohl, *supra* note 3, at 11.
[62] *Id*.
[63] Marcus, *supra* note 6, at 8.

social order," then there is possibility in subversions of and resistances to this position.[64] While "the manner in which a legal system enforces social stratification will evolve over time, changing shape as it is contested," some structures die hard.[65] The durability of the erotic triangle, appearing in many different eras, and in many different guises, attests to the importance of the gendered pattern of relations it represents.[66] This collection of three independent yet deeply connected articles shows the resilience of law's erotic triangulations, but also suggests the possibility of their disruption.

[64] Wohl, *supra* note 3, at 11.
[65] Reva Siegal, "*The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117, 2179 (1996).
[66] *Id*.

A NEW TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS: GENDER AND EROTIC TRIANGLES IN *LUMLEY v. GYE*

SARAH SWAN*

INTRODUCTION

At the intersection of tort, property, and contract law sits a strange tort.[1] It began in 1853, in London, England, from a ferocious rivalry between two competing opera-house owners.[2] Johanna Wagner, a celebrated soprano star, had agreed to perform at Benjamin Lumley's opera house, but before she began her engagement, she accepted a better offer from Lumley's rival, Frederick Gye, to perform at his venue instead. Lumley pursued remedies in

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[1] Gary D. Wexler, Note, *Intentional Interference with Contract: Market Efficiency and Individual Liberty Considerations*, 27 CONN. L. REV. 279, 282 (1994).

[2] S.M. Waddams, *Johanna Wagner and the Rival Opera Houses*, 117 LAW Q. REV. 431, 431 (2001).

contract against Wagner, but also sought to bring a suit in tort against Gye.[3] In *Lumley v. Gye*, a case heard on demurrer, the court extended the ancient action of enticement, and held that this kind of inducing or procuring a contractual breach could constitute a wrong capable of redress in the form of tort.[4] Generally called interference with contractual relations in America,[5] this tort is now a common cause of action in commercial litigation.[6] It also formed the basis for one of the largest civil jury awards in American history.[7]

Despite its popularity among litigants, academics routinely decry the tort and advocate its alteration, abandonment, or abolishment.[8] They offer a compelling laundry list of the tort's most problematic aspects. Among other issues, the tort violates the doctrine of privity of contract by imposing rights and obligations on non-contractual parties, transforms an in personam right in contract into an in rem right in tort, treats the breaching promisor as the property of the original promisee, and ignores the breaching promisor's role

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[3] Lumley's suit against Wagner gave rise to the Lumley rule, which holds that a negative injunction may be awarded in circumstances where specific performance cannot be granted. *See* Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.) 687. Lea VanderVelde explores how gender influenced the subsequent development of this rule in *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity,* 101 YALE L.J. 775 (1992) [hereinafter VanderVelde, *Gendered Origins*].

[4] Lumley v. Gye, (1853) Eng. Rep. 749 (Q.B.) 750. In a demurrer, one party argues that the facts as alleged do not establish a legal cause of action.

[5] The RESTATEMENT (SECOND) OF TORTS § 766 (1979) offers the following generic definition of interference with contractual relations:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

[6] Although *Lumley v. Gye* is an English case, it did not take long for American law to incorporate the principle into its own jurisprudence. Indeed, in an 1894 case, *Angle v. Chicago, St. P., M. & O. Ry.*, the Supreme Court of the United States cited *Lumley v. Gye* and noted that case law had "repeatedly held" that the cause of action existed in America. Angle v. Chicago, St. P., M. & O. Ry., 151 U.S. 1, 13–14 (1894). Now, "[t]he tort of interference with contract is one of the most pervasive causes of action in American business litigation." Wexler, *supra* note 1, at 280.

[7] In *Texaco v. Pennzoil*, the plaintiff was awarded $7.5 billion in compensatory damages and $3 billion in punitive damages. 729 S.W.2d 768, 784 (Tex. Ct. App. 1987). The punitive damage award was lowered to $1 billion on appeal. *Id.* at 866.

[8] *See, e.g.*, Harvey Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 62 (1982) (arguing that tort liability should be limited to instances where the defendant's act was independently wrongful); Wexler, *supra* note 1, at 282 (arguing for legislative abrogation of the tort); Dan Dobbs, *Tortious Interference with Contractual Relationships*, 34 ARK. L. REV. 335, 337 (1980) (arguing for a more narrow basis of liability). Indeed, Dobbs compares the tort to the "unspecified crime" in Franz Kafka's *The Trial*, "the nature of which cannot be, and is not ever revealed" to the accused protagonist. Dobbs, *supra* at 346 (referencing FRANZ KAFKA, THE TRIAL (Willa Muir & Edwin Muir trans., London, Secker and Warburg 1945) (1925)).

in causing the breach.[9] Most importantly, the tort infringes upon the liberty and autonomy of the breaching party, both by disregarding her freedom to choose whether to perform or breach and by impeding her ability to enter into new and more beneficial agreements.[10]

The problems associated with the tort are easy to identify, but how it became a viable cause of action in spite of its deeply troubling features has been a more difficult question.[11] In this Article, I show how an understanding of the tort's gendered origin illuminates many of the doctrinal puzzles surrounding the tort.[12] Specifically, I connect interference with contractual relations to the structure of an erotic triangle, a cultural archetype in which two rivaling men compete for a desired woman.[13]

Part II of this Article sets out the factual, cultural, and legal background of *Lumley v. Gye*. It describes the intense personal rivalry between the two men, sets out the prevalence and significance of erotic triangles in Victorian England, and explains how the law regulated gendered triangular conflicts in the causes of action that formed the legal precedents for *Lumley v. Gye*.

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[9] Wexler, *supra* note 1, at 281 (listing various problems with the tort, including that it "hinders market efficiency, produces erroneous liability rulings, and fosters uncertainty in the law"); Dobbs, *supra* note 8, at 351, 361 (stating the tort is problematic in that it binds non-contractual parties); J.W. Neyers, *The Economic Torts As Corrective Justice*, 17 TORTS L.J. 162, 164 (2009) (listing several issues inherent in the tort, such as its conversion of in personam rights to rights in rem and its violation of privity of contract). As these scholars note, the tort also acts as a limitation on the inducer's right to freedom of speech, negatively impacts the free functioning of the market, and is so unworkable in application that it is nearly impossible to predict whether particular acts will result in liability or not.

[10] Neyers, *supra* note 9, at 164; Wexler, *supra* note 1, at 281; Dobbs, *supra* note 8, at 361.

[11] As Dobbs notes, "No real reasons seem to have been given why a third person should be liable for the honest persuasion of another . . . ." Dobbs, *supra* note 8, at 344.

[12] The phrase "gendered origins" comes from the title of Lea VanderVelde's article, *The Gendered Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity*, *supra* note 3. In addition to finding much inspiration in VanderVelde's work, I also adopt her definition of "gendered" as encompassing "a broad range of gender-specific elements," including "sexist behavior, sex role typing, unequal treatment, charged language of a gender-specific nature, and sexual harassment." *Id.* at 778.

[13] This Article takes a broad view of Western culture, and draws from Anglo American literary, legal, and cultural sources throughout. The close connection between the Anglo and American versions of Victorian culture and the ties between their legal systems warrants such an approach. Jane Larson explains:

> Most of the provinces of Canada, like virtually all the states of the United States, were part of the Anglo-American common law system. Moreover, nineteenth-century Canada shared with the United States, Britain, and Australia a "Victorian" culture embodying distinctive views of sexuality and sex roles. Extending across national borders, Victorian values were shared by English-speaking people throughout the Western world.

Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit:'" A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 383 n.31 (1993). *See also* SASKIA LETTMAIER, BROKEN ENGAGEMENTS: THE ACTION FOR BREACH OF PROMISE OF MARRIAGE AND THE FEMININE IDEAL, 1800–1940 13 (2010).

Part III examines how the gendered scenario underlying *Lumley v. Gye* influenced the way the court understood the case. The court focused on the relationship and rivalry between Lumley and Gye, and downplayed the role of Wagner in the triangular dispute. The male-centered approach allowed the court to break the doctrine of privity of contract and carve out a new source of tortious liability. Further, Wagner's status as a woman caught in the middle of this rivalry permitted the court to rely on previous legal fictions about causation, consent, and women, to ignore her role in causing the breach, and to treat her as though she were the property of the original promisee.

Part IV explores how the underlying gendered dispute in *Lumley v. Gye* created a tort that was facially neutral, but often deployed as an effective means of oppression over marginalized groups. The tort commodified the original promisor and her labor in a way that obscured her freedom of contract and facilitated her exploitation. Exploitation occurred in various contexts: the tort was used as a tool to restrict the mobility of recently freed slaves in the southern United States, as a means to squash attempts at labor union organization, and as a way to restrict employee mobility.

Part V offers a restructuring of the tort that neutralizes its gendered nature and resolves many of the problems associated with interference with contractual relations. Re-conceiving the tort as one in which both the promisor and the inducer play significant roles and are connected through a theory of joint liability ensures that the relationship between the contractual wrong and the tortious one is more compatible with private law principles. Also, the causation analysis of this version of the tort does not require a legal fiction to support it, and the breaching promisor is not treated as the property of the original promisee. This new view also advocates limiting the damages to those available under contract law principles in order to reflect a non-gendered understanding of the nature of the injury.

Ultimately, it is hoped that this Article reinforces the potential for feminist scholarship to enrich our general understanding of private law and clarify areas of doctrinal confusion. Focusing a feminist light on interference with contractual relations allows us to see how a tort that appears facially neutral is actually premised upon deep gender biases. Applying a feminist perspective also leads to re-envisioning the tort in a way that addresses these problems and offers a cohesive and coherent version of interference with contractual relations.

I. LUMLEY V. GYE

A. Factual Background: The Rivalry

Long before Benjamin Lumley and Frederick Gye arrived at the Court of Queen's Bench in 1853, the two men had been engaged in an intense,

longstanding rivalry. Lumley's opera house, Her Majesty's Theatre, "had been 'practically the sole home of Italian opera'" until Gye's venue, Covent Garden, opened in 1847, and "in the succeeding years each opera house attempted to take over the other's business."[14] The rivalry was not limited to the business context, but was also deeply personal. In his diary, Gye tellingly wrote, "I have heard bad things of Lumley & now find him a devil incarnate—the most dreadful rascal with the smoothest face & manner I ever in the whole course of my life met . . . ."[15] The feeling was evidently mutual, as Gye also wrote that Lumley had vowed that "there would be war to the knife & he would crush me and Covent Garden too!!!"[16]

Each man considered Johanna Wagner to be an important acquisition if they were to best the other, and they both desperately wanted to book the rising soprano star. As Gye described her in his diary:

> Mdlle Wagner is a tall, handsome woman about 24, fair, with beautiful eyes hair and teeth & very graceful—her voice is of great compass, is clear powerful and good in all parts; she sings perfectly in tune and acts well but wants a little good Italian tuition—she would hold an excellent position in London or Paris & bids fair to be one of the first singers in Europe.[17]

Lumley echoed these sentiments in his memoirs, describing her as:

> A magnificent voice, a broad and grand school of vocalization, and a marvellous [sic] dramatic power, joined to a comely person, were confidently asserted to form the almost unequalled attractions of this young lady, on whose co-operation the future fortunes of the establishment were now considered in a great measure to depend.[18]

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[14] Waddams, *supra* note 2.

[15] *Id.* at 432 (quoting Diary of Frederick Gye, entry for December 25, 1851).

[16] *Id.* (quoting Diary of Frederick Gye, entry for February 18, 1852). Ten years after *Lumley v. Gye*, Lumley could not resist insulting Covent Garden in his memoirs about the opera. When lamenting the loss of recent operatic singing talents, Lumley accused Covent Garden of amplifying the orchestral sound so as to drown out the frailties of the talent: "The orchestra, having been augmented in proportion as vocal talent has waned, now constitutes the leading feature, especially at Covent Garden, where its masses of sound serve but to cover the deficiencies of artists whose voices it should assist and support." BENJAMIN LUMLEY, REMINISCENCES OF THE OPERA ix (1864). Interestingly, when Lumley writes of the case, he appears most focused on Johanna Wagner's perceived betrayal of him, referring to her trickery, etc. *Id.* at 331–32. This may be because a jury ultimately found Gye not liable, on the basis that Gye honestly believed that the contract between Lumley and Wagner was terminated, and Lumley did not want to dwell on the fact that his nemesis ultimately beat him in court. *See* Waddams, *supra* note 2 at 455–56.

[17] Waddams, *supra* note 2, at 433–34 (quoting Travel Diary of Frederick Gye, entry for January 5, 1850).

[18] LUMLEY, *supra* note 16, at 328.

In pursuit of Wagner, Lumley and Gye engaged in vigorous wooing and "extraordinary efforts" to attract her to their venues.[19] Gye visited her in Berlin in 1851, and shortly thereafter a representative of Lumley visited her as well.[20] Lumley made her an offer, and negotiations began, which ultimately resulted in an agreement of engagement.[21] However, Lumley failed to make an advance payment when it became due, and Wagner, who now regretted the agreement with Lumley and had negotiated with Gye to earn more performing at his theatre, considered the contract to be in default.[22] She communicated to Lumley that she now considered their contract over, and refused to perform at his opera house. Lumley then turned to the courts for a remedy. He brought two suits: one seeking to enjoin Wagner from performing at Covent Garden (*Lumley v. Wagner*), and another seeking damages against Gye (*Lumley v. Gye*).[23]

Because of the novelty of the claim Lumley asserted, Gye challenged him on demurrer and argued that there was no legally recognized claim.[24] Lumley argued that the old action of enticement, which prohibited a man from enticing away another's servant, was broad enough to encompass the kind of factual scenario before the court.[25] In a complex and often contradictory decision, and despite a powerful dissent by Lord Coleridge, a majority of the Court of Queen's Bench agreed with Lumley, and the new tort of interference with contractual relations was born.[26]

B. Cultural Background: Erotic Triangles

Two men fighting over a woman, i.e. an erotic triangle, was not a new scenario in Victorian England, nor would it be today.[27] Erotic triangles are a resilient and enduring archetype, found in the cultural productions of all periods of Western civilization, from Homer's *The Iliad*, to Flaubert's *Madam Bovary*, to the 2010 Man Booker Prize winning novel, *The Finkler Question*,

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[19] Waddams, *supra* note 2, at 433.

[20] *Id.* at 434.

[21] *Id.*

[22] *Id.* at 438. Wagner's father acted as her advisor in these matters, and the negotiations indicated that all involved were sophisticated parties. *Id.* at 434.

[23] As Waddams explains, Gye was also "named as a defendant" in *Lumley v. Wagner*, and "the injunction was issued against him personally, as well as against Wagner." *Id.* at 446.

[24] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 751 (argument by Willes on behalf of Gye).

[25] *Id.* at 751 (argument by Cowling on behalf of Lumley) ("[I]t cannot be said that the action for procurement is an anomaly confined to the case of master and servant.").

[26] *Id.* (Crompton, J., Erle, J. & Wightman, J.).

[27] The love triangle is still an extremely common trope. *New York Magazine* declared 2010 to be "The Year of the Onscreen Love Triangle," citing movies like *The Twilight Saga: Eclipse* (Summit Entm't 2010) and HBO's television series *True Blood: Season 3* (HBO 2010) as examples. Kyle Buchanan, *2010: The Year of the Onscreen Love Triangle*, N.Y. MAG. (Dec. 30, 2010, 3:15 PM), http://nymag.com/daily/entertainment/2010/12/love_triangles_slideshow.html.

by Howard Jacobson.[28] Erotic triangles are embedded in our cultural narrative and form an important part of our lived experience.[29]

In Victorian culture, the erotic triangle was a hugely popular and highly salient structure. Many books, plays, and operas appearing at that time featured erotic triangles, and the marital/adultery iteration of the triangle proved particularly fascinating to Victorian audiences.[30] In *Between Men: English Literature and Male Homosocial Desire*, Eve Kosofsky Sedgwick used René Girard's study of nineteenth century literature to show how gender and power function in these structures.[31] The triangles are premised on the bond between the two rivaling men, and this male relation of rivalry constitutes a particular "calculus of power" from which the desired object is altogether excluded.[32] Although at first glance it may appear like erotic triangles arise because two men happen to desire the same woman, the second man actually desires the woman because of her connection to the rival; it is not her innate qualities, but rather her link to the other man, that makes her the rival's desired object.[33] The bond between the men is the triangle's most significant bond, an "intense and potent" connection that is "more heavily determinant of actions and choices, than anything in the one between either of the lovers and the beloved . . . ."[34] Sedgwick termed this bond "homosocial," meaning

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[28] HOMER, THE ILIAD (T.A. Murray trans., Harvard University Press 1999); GUSTAVE FLAUBERT, MADAME BOVARY (Merloyd Lawrence trans., Houghton Mifflin 1969) (1856); HOWARD JACOBSON, THE FINKLER QUESTION (2010).

[29] While the paradigmatic male-male-female triangle is continually explored in cultural productions, various permutations and transformations of the model appear as well, adding to the rich complexity of this popular structure. In the late 1990s, a series of films including AS GOOD AS IT GETS (TriStar Pictures 1997), CHASING AMY (Too Askew Prod. Inc 1997), THE OPPOSITE OF SEX (Rysher Entm't 1998), and THE OBJECT OF MY AFFECTIONS (Twentieth Century Fox Film Corp. 1998) featured neo-homosocial triangles in which a gay man or lesbian competed with a straight man for the affections of a heterosexual woman. *See* Judith Halberstam, *The Good, the Bad, and the Ugly: Men, Women and Masculinity*, *in* MASCULINITY STUDIES & FEMINIST THEORY: NEW DIRECTIONS 344, 346–51 (Judith Kegan Gardiner ed., 2002) (discussing how the neo-homosocial triangles in these films reinforce rather than criticize traditional standards of femininity and masculinity); *see also* TODD W. REESER, MASCULINITIES IN THEORY: AN INTRODUCTION 64–70 (2010) (examining different permutations of the homosocial triangle). Litigator Jeffrey Greenstein summarizes: "Indeed, the love triangle is everywhere. As one author noted not too long ago, '[p]ick up almost any novel, go to almost any film or play, listen to a popular song, and the chances are high that it will deal centrally with adultery.'" Jeffrey Brian Greenstein, *Sex, Lies and American Tort Law: The Love Triangle in Context*, 5 GEO. J. GENDER & L. 723, 725 (2004) (quoting ANNETTE LAWSON, ADULTERY: AN ANALYSIS OF LOVE AND BETRAYAL 17 (1988)). Greenstein lists FATAL ATTRACTION (Paramount Pictures 1987), DANGEROUS LIAISONS (Lorimar Film Entm't 1988), INDECENT PROPOSAL (Paramount Pictures 1993), and DOCTOR ZHIVAGO (Metro-Goldwyn-Mayer 1965) as examples of famous films that feature marital/adultery triangles. *Id.*

[30] *See* Larson, *supra* note 13, at 392.

[31] EVE KOSOFSKY SEDGWICK, BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE 21 (1985) (citing RENE GIRARD, DECEIT, DESIRE, AND THE NOVEL: SELF AND OTHER IN LITERARY STRUCTURE (Yvonne Freccero trans., The Johns Hopkins Univ. Press 1976) (1961)).

[32] *Id.*

[33] *Id.*

[34] *Id.*

a kind of social bond between persons of the same sex, one that incorporates the entire spectrum of sexual and non-sexual desire.[35]

These homosocial bonds play important roles in structuring the relationships between men, and in constructing masculine subjectivity. Recent masculinities studies have provided the insight that masculine identity is defined through a process of constant competition and rivalry, a "process of comparison, of measuring, that puts each man against all others."[36] Masculinity is performed for other men; male peers and male authority figures are the judges who determine whether the performance was successful.[37] A failed performance will likely result in feelings of humiliation, and it is the very fear of this humiliation that prompts much of the competition itself.[38] Even a successful performance offers little peace, for no sooner is masculinity proved once "that it is again questioned and must be proved again—constant, relentless, unachievable."[39]

Choosing another man as a rival can come from a place of love, hate, or anything in between.[40] The rivalry can be a sort of euphemism for the desire to identify with or emulate the other, or it can be the classic, negative version of rivalry, in which one man seeks to defeat or best the other.[41] "[M]en often collaborate, cooperate and identify with one another in ways that display a shared unity and consolidate power between them," but their relationships "can also be characterized simultaneously by conflict, competition and self-differentiation in ways that highlight and intensify the differences and divisions between men."[42] They can use erotic triangles as a means of strengthening social ties, or as a way of challenging another's masculinity. Traditional marriage is perhaps the best example of an erotic triangle used to solidify a relationship: a father historically gave his daughter to another man as a way of aligning two families. Conversely, when one man challenged

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[35] *Id.* at 1–2.

[36] Nancy E. Dowd, *Masculinities and Feminist Legal Theory*, 23 WIS. J.L. GENDER & SOC'Y 201, 233 (2008) [hereinafter Dowd, *Masculinities*]. *See also* Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame and Silence in the Construction of Gender Identity, in* THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY 25, 33 (Michael S. Kimmel ed., 2005); Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis*, *in* FEMINISM & MASCULINITIES 57, 61–62 (Peter Murphy ed., 2004)

[37] Michael S. Kimmel, *Masculinity as Homophobia*, *in* RACE, CLASS, AND GENDER IN THE UNITED STATES 80, 86 (Paula S. Rothenberg ed., 7th ed. 2007).

[38] Dowd, *Masculinities*, *supra* note 36, at 209 (citing David Leverenz, *Manhood, Humiliation, and Public Life: Some Stories*, 71 SOUTHWEST REV. 442 (1986)).

[39] Kimmel, *supra* note 37, at 82.

[40] REESER, *supra* note 29, at 56.

[41] *Id.*

[42] David Collinson & Jeff Hearn, *Naming Men as Men: Implications for Work, Organization and Management*, *in* THE MASCULINITIES READER 144, 162 (Stephen M. Whitehead & Frank J. Barrett eds., 2001).

another by attempting to take a woman from him, such actions historically led to violence and blood feuds between families.[43]

In either scenario, though, women function as objects of exchange, rather than full persons. As the "locus of a more or less competitive exchange between two men," the woman is subordinated to a passive role;[44] the rivalry and relationship between the two men occurs "over" the woman, and she is the point beneath. Men retain their status as active subjects, while women are essentially transformed into commodities. Commodification, broadly speaking, is the "reduction of the person (subject) to a thing (object)."[45] Commodification has implications for the power structure of a society; "[o]ften, those whom commodification objectifies become entrenched as society's subordinated class. Conversely, those who control the terms of commodification secure their position as society's ruling class."[46] Law plays an important role in determining who is commodified and who does the commodifying.[47]

C. Legal Background

Erotic triangles have long been part of our legal narrative. Indeed, the understanding that relationships between men are often triangulated through women (and through certain other men occupying the lower ranks of the patriarchal hierarchy) was incorporated into ancient Roman law.[48] In that system, the *paterfamilias*, or head of the household, was entitled to bring an action for violence or insults inflicted upon his wife, children, or slaves.[49] It was understood that violence or insults to a person under the control of the *paterfamilias* was actually "only another form of insult to the *paterfamilias* himself."[50] In other words, one man would get at another through a third person, a member of the challenged man's household.

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[43] The seduction action, for instance, was meant as a legal substitute for the patriarchal violence and retribution that normally would have accompanied the rape or seduction of a young woman. *See* Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 831–32 (1996) [hereinafter VanderVelde, *Legal Ways of Seduction*].

[44] Luce Irigaray, *The Sex Which is Not One*, *in* FEMINISMS: AN ANTHOLOGY OF LITERARY THEORY AND CRITICISM 363, 368 (Robyn R. Warhol & Diane Price Herndl eds., 1997).

[45] Margaret Jane Radin & Madhavi Sunder, *The Subject and Object of Commodification*, *in* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 8, 8 (Martha M. Ertman & Joan C. Williams eds., 2005) [hereinafter RETHINKING COMMODIFICATION]

[46] *Id.*

[47] Martha M. Ertman & Joan C. Williams, *Preface: Freedom, Equality, and the Many Futures of Commodification, in* RETHINKING COMMODIFICATION, *supra* note 45, at 1–2.

[48] *See* Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663 (1923).

[49] *Id.*

[50] *Id.*

By the mid-thirteenth century, English law had incorporated the idea that one man may strike at another through the body of a third person.[51] A lord could bring two types of actions against a person who harmed the members of his household: one for the loss of services he suffered when a dependent member of his household was injured, and the second for the insult to the lord himself.[52] In this second type of action, although the physical harm was inflicted on the body of another, the law interpreted that as an insult to the lord himself, an injury compensable to the lord regardless of whether or not the physical harm to his wife or servant resulted in an actual loss of services.[53]

By the time William Blackstone wrote of the "three great relations" of English life in the mid-eighteenth century, each of these relationships was specifically protected against the kind of injury and insult described above.[54] The three great relationships, master-servant, father-child, and husband-wife, came with legal actions that compensated the challenged male when another man caused the loss of services of his servant, child, or wife.[55] These actions also included the legal recognition that the challenged man suffered a personal insult when a rival violently or insultingly interfered with the members of his household. The protections surrounding these three "great" relationships formed the legal precedents upon which the *Lumley v. Gye* decision was based.

1. *Master-Male Rival-Servant: Enticement*

In medieval times, the common law offered protection against three separate interferences in the master-servant relationship.[56] The three causes of action were as follows: first, *per quod servitium amisit* allowed a master to recover damages against a third party who beat his servant.[57] Second, a master could recover against a third party who wrongfully retained or harbored his servant.[58] Finally, a master could also recover if a third party enticed or procured away his servant.[59] In this context, men of subordinated status and women occupied the same role of mediating a relationship be-

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[51] *Id.* at 663–64 (citing HENRY DE BRACTON, 3 BRACTON ON THE LAWS AND CUSTOMS OF EARLY ENGLAND, Tr. I, f. 115).

[52] *Id.*

[53] *Id.* at 664.

[54] VanderVelde, *Gendered Origins*, *supra* note 3, at 789 n.62 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *410 (1765)).

[55] These actions are more fully described in the following sections, Part II.C.1–3, *infra*. They are, respectively, enticement, seduction, and criminal conversation.

[56] Gareth H. Jones, *Per Quod Servitium Amisit*, 74 LAW Q. REV. 39, 39–40 (1958).

[57] *Id.*

[58] According to Blackstone, "this, as it is an ungentlemanlike, so it is also an illegal act." 3 BLACKSTONE, *supra* note 54, at *142.

[59] *See* Jones, *supra* note 56, at 40.

tween two men; both females and subordinated males served as the desired object in this context.[60]

In the 1300s, after the Plague had decimated the population of workers, laws governing the master-servant relationship gained a new importance. In addition to the usual common law remedies, the Statute of Labourers of 1351 gave a legislative cause of action to masters, accompanied by severe penalties for disobedient servants.[61] In essence, the Statute "compelled involuntary servitude at pre-Plague wages and criminalized the enticing away of another's servants."[62] It provided a penalty of imprisonment for workers who left their employment, and for the new employers that hired them.[63]

As was pointed out in *Lumley v. Gye*, the Statute was specifically targeted at a lower class of workers; it did not require everyone to work at pre-Plague wages, just those who labored in the traditional sense.[64] Those who held a higher status, like knights, esquires or gentlemen, were not subject to the ordinance.[65] The Statute forced only a lower class of servants to stay with their original employer or face imprisonment. The Statute effectively prevented this class of worker from having any mobility to transfer to a new employer or command a higher wage, and provided the master with a powerful tool to keep other men from competing with him for the services of his servant.

2. *Father-Male Rival-Daughter: Seduction*

Like the master-servant relation, the father-daughter relation was also protected against interference. By the nineteenth century, seduction, which allowed a father to bring suit against anyone who sexually interacted with his daughter without his consent, was a popular cause of action.[66] Seduction's underlying framework was heavily reliant on the law of master-servant relations. Indeed, at that time, the employment relation between a master and a female servant was similar to the familial relation between a father and daughter: a master/father stood *in loco parentis* to both.[67] Sexual interference with a female servant was treated as analogous to physical interference

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[60] Not every man shares in the patriarchal dividend equally. Some men are also subordinated in the system of male privilege. *See* NANCY DOWD, THE MAN QUESTION: MALE SUBORDINATION AND PRIVILEGE 5 (2010).

[61] Statute of Labourers, 1351, 25 Edw. 3, St. 1, c. 1. *See* Jones, *supra* note 56, at 39–40 (providing a brief discussion of the background and passage of the Statute of Labourers).

[62] Wexler, *supra* note 1, at 285.

[63] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §129, at 980 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS].

[64] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 759 (Erle, J.).

[65] *Id.* at 759 (Erle, J.), 768 (Coleridge, J., dissenting).

[66] Rachel F. Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 773 (2001).

[67] Sanford M. Jacoby, *The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis*, 5 COMP. LAB. L. 85, 89 (1982).

with a male servant, since, like a beating, sexual interference and a resulting pregnancy could disable the female servant and cause her to leave the service.[68] Seduction of a father's daughter fell within this same "loss of services" rubric, and initially focused on the loss of the daughter's contribution to the household income.[69] The cause of action later focused on the particular injury to the father: he suffered a loss of status corresponding to his daughter's perceived loss of virtue.[70]

Seduction was rooted in the idea that fathers owned their daughters, and were entitled to sole custodial rights.[71] Part of this ownership included a property right in a daughter's body and sexuality.[72] This property right rendered a daughter's consent or lack thereof to the sexual interaction a nonissue; she could not legally agree to engage in behavior that conflicted with the property right of her father.[73] Sexual access to her was his right to give.

Courts sometimes justified the tort of seduction partly on the basis that it prevented the patriarchal violence and retribution that occurred when fathers took the law into their own hands.[74] Early common law sources show that nonmarital sex was understood as a battle between the men, and a heated one at that.[75] Seduction of young women could incite men to violent retaliation, and lead to enduring blood feuds.[76] As self-help retaliation moved to the "the more regularized public order of a lawsuit," the tort of seduction provided a legal substitute for that feud, and in lieu of blood vengeance, provided that fathers would receive damages.[77]

3. *Husband-Male Rival-Wife: Criminal Conversation*

While enticement offered compensation if one man "stole" another's servant, and seduction offered compensation if one man "stole" another's daughter, criminal conversation offered compensation if one man "stole" another's wife through sexual intercourse.[78] As with seduction, criminal conversation evolved from the master-servant rule.[79] In the early seventeenth century, when the master-servant rule expanded to apply to an interference with the husband-wife relationship, the injury was framed in terms of a loss

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[68] VanderVelde, *Legal Ways of Seduction*, *supra* note 43, at 821.
[69] *Id.* at 821.
[70] Moran, *supra* note 66, at 773.
[71] *See* MARY LYNDON SHANLEY, FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND, 1850–1895, at 25 (1989).
[72] Larson, *supra* note 13, at 382.
[73] *Id.* at 386.
[74] *See* VanderVelde, *Legal Ways of Seduction*, *supra* note 43, at 837.
[75] *Id.* at 831.
[76] *Id.*
[77] *Id.* at 837.
[78] *See* Greenstein, *supra* note 29, at 734–35. Criminal sanctions were available to remedy this type of "taking." For a time during the mid-1600s, adultery was a capital offense in England, and in some areas of colonial America. *Id.* at 725.
[79] *Id.* at 733–34.

of services: loss of consortium allowed a cuckolded husband to bring an action against his wife's lover for damages on the basis that the lover had deprived him of his wife's services.[80] Later in the century, loss of consortium gave rise to a separate tort of criminal conversation, and criminal conversation dropped the requirement that the injury be framed in this way. The tort treated the adultery as a trespass and injury in itself.[81]

The doctrine of coverture was an important founding principle for both loss of consortium and criminal conversation. Under coverture, the legal existence of the wife was subsumed upon marriage into that of her husband. Marriage essentially "confer[red] upon one of the parties to the contract, legal power & control over the person, property, and freedom of action of the other party, independent of her own wishes and will . . . ."[82] A wife lacked the benefits of full legal personality: she could not make contracts, own property, nor lay claim to the proceeds of her own labor.[83] Consistent with the framework of coverture, a wife's consent to the alleged adultery was legally irrelevant. Since she did not own the exclusive rights to her body, she could not be the one to exercise those rights. The only possible defense to criminal conversation, which was basically a strict liability tort, was the consent of the husband.[84]

The criminal conversation action was initially only available to husbands, and wives had no corresponding ability to make a claim if their husbands were unfaithful.[85] Legally and culturally, the injury done to a wife when her husband was unfaithful was framed as mere hurt feelings.[86] Conversely, the husband's emotional injury, inflicted upon him by another man through the medium of his wife, was treated as a serious issue.[87] Even when framed as a property matter in the early form of the tort, the parties involved

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[80] LAURA HANFT KOROBKIN, CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY 51–52 (1998).

[81] *Id.* at 52. Even though criminal conversation did not require an allegation that there had been a loss of services, plaintiffs continued to allege that throughout the nineteenth century. *Id.* at 53.

[82] F.A. HAYEK, JOHN STUART MILL AND HARRIET TAYLOR: THEIR CORRESPONDENCE AND SUBSEQUENT MARRIAGE 168 (1951) (reprinting letter from John Stuart Mill (Mar. 6, 1851)).

[83] Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 J. AM. HIST. 471, 477 (1988).

[84] Moran, *supra* note 66, at 775.

[85] Nor could they simply quit the marital relationship; divorce was "virtually unattainable until the Matrimonial Causes Act of 1857." KOROBKIN, *supra* note 80, at 22.

[86] *See* Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 817–18 (1990).

[87] The law also recognized the magnitude of the injury by providing a defense for husbands who killed their wives' lovers.

> Adultery in the nineteenth century was also a legitimate basis for husbands to kill seducers. Legally, this was explained as an extension of a man's right to self-defense, not only of himself but also of his property as was the case with trespassers or burglars. The right was restricted, however, to killing a seducer "on the spot," thus justifying the killing as one that took place in the heat of passion rather than as a premeditated act that would be harmful to public peace.

in loss of consortium and criminal conversation actions recognized that the true harm being recompensed was actually an injury to masculinity.[88] The harm was understood as a kind of emasculation or castration, "a figurative rape of man by man."[89] Trivial losses of service triggered large damage awards for cuckolded husbands, to compensate this sense of dishonor.[90]

The criminal conversation cause of action did two important things: it commercialized the sexual dispute and removed women from the legal discourse.[91] The tort converted the sexual dispute from a type of perceived challenge to masculinity that would once have resulted in violence into a private, commercial one, between men.[92] The lawsuit became a contest in which husbands and lovers competed for patriarchal supremacy through a regulated economic fight in the courtroom, from which only one would emerge dominant.[93] Within this contest, the interests of women were irrelevant. As a "classically homosocial structure," the tort is

> between the two men; the wife's function in the case is as its contested object, her sexuality something that links the men and to which a money value is to be attached. Though her behavior is thus central to the litigative story, her "consent" to the adultery—her willingness, aggression, emotional involvement, in short, her subjectivity—is legally irrelevant, and therefore outside the story's narrative boundaries.[94]

In the criminal conversation action (as in the enticement and seduction actions), the woman's role is subordinate: she acts as object to the male subjects. The legal story converts a sexual rivalry into "an economic relationship between two men, husband and lover" concerning "financially assessable damage to property."[95] In this story, the wife "fades from view."[96] The relationship of wife to lover and wife to husband is minimized or eliminated, and "the litigative conversation that ensues is entirely male-voiced."[97]

Nehal A. Patel, *The State's Perpetual Protection of Adultery: Examining* Koestler v. Pollard *and Wisconsin's Faded Adultery Torts*, 2003 Wis. L. Rev. 1013, 1021 n.81 (2003) (citations omitted).

[88] Korobkin, *supra* note 80, at 52 ("[T]he linguistic [and legal] fiction[s] substituted for what was understood to be the true harm: the unmentionable adultery and its effect on masculine honor.").

[89] *Id.* at 48.

[90] *Id.* at 52.

[91] *Id.* at 47–48.

[92] *Id.*

[93] *See id.*

[94] *Id.* at 93.

[95] *Id.* at 47–48.

[96] *Id.* at 48.

[97] *Id.*

II. Male Employer-Male Rival-Female Employee: Contractual Interference

Prior to *Lumley v. Gye*, no court had held that procuring a breach of contract could constitute a tort.[98] The only procurement cases were the ones described above, involving servants, daughters or wives—"enticing away dependent members of another's household."[99] Why, then, did this particular case lead the court to expand tortious liability?[100] The answer, I suggest, must include a recognition of the particular gendered scenario that came before the court. As a woman, Johanna Wagner was more easily conflated with a dependent member of another's household, and the scenario therefore appeared more similar to those grounding the actions of enticement, seduction, or criminal conversation. Had Johanna Wagner been a man of equal social standing with Lumley and Gye, this association likely would not have manifested in the same way. In order for there to be a cause of action, the decision in *Lumley v. Gye* required one of two questions to be answered in the affirmative: either Johanna Wagner was a servant and thus naturally caught within the enticement action, or the enticement principle was broad enough to include her as a non-servant.[101] Her status as a woman caught between two competing men made the affirmative answers to both questions more likely. The factual matrix of *Lumley v. Gye* appeared as an erotic triangle, and the court therefore applied its cultural and legal knowledge of the regulation of erotic triangles to extend its principles to this new scenario.

As cognitive psychology has taught us, "culturally embedded stories or scripts," which are themselves usually inflected with gender, deeply affect our thoughts and decisions.[102] Stories about the way the world is, and the way people are, frame our beliefs and actions.[103] They influence our reasoning, including our legal reasoning. While cultural beliefs and norms inflect all areas of law, they are particularly potent in tort law.[104] Tort law, perhaps even more than other areas of law, is profoundly impacted by culture.[105] In many ways, tort law is less formalistic and more flexible than other legal fields.[106] Its "open-textured qualities allow great latitude for meaning mak-

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[98] Sayre, *supra* note 48, at 667.

[99] *Id.*

[100] Waddams, *supra* note 2, at 449.

[101] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 761 (Coleridge, J., dissenting). The majority of the judges categorized Wagner as a servant. *Id.* (Crompton, J., Erle, J. & Wightman, J.)

[102] Peggy Cooper Davis, *The Proverbial Woman*, 48 Rec. Ass'n B. City N.Y. 7, 11 (1993).

[103] *Id.*

[104] *See* David M. Engel & Michael McCann, *Introduction: Tort Law as Cultural Practice, in* Fault Lines: Tort Law as Cultural Practice 1, 2 (David M. Engel & Michael McCann eds., 2009) [hereinafter Fault Lines].

[105] *Id.* at 3.

[106] Valerie P. Hans, *Juries as Conduits for Culture? in* Fault Lines, *supra* note 104 at 80, 80–81 (quoting Professor Peter Schuck: "Tort liability, more than most areas of

ing by all the actors in the tort law system and make tort law a particularly important site of the articulation and dissemination of cultural norms and images."[107]

Because of its susceptibility to the importation of cultural beliefs and norms, tort law has an important role in gender ordering. If the culturally salient stories are ones of patriarchy and gender hierarchy, as erotic triangles are, tort law will reflect those values and can become "complicit in the control of women."[108] Each party to a tort action comes with a gender (and a race, sexual orientation, and economic or social class), and these characteristics come with their own stories.[109] These characteristics and their corresponding stories shape the way that the law is constructed and applied: the interpretations and understandings of legal claims, and the legal responses to harms, are often shaped by these factors.[110] Legal actors, including judges, draw upon cultural ideas and "deeply embedded notions" of gender that exist beyond the formal confines of the specific cases before them,[111] and these cultural understandings are then taken up and reified in the law.[112] This effect is not limited to cases that are explicitly *about* women, as cases concerning domestic or family matters are sometimes viewed. Instead, "restricted conceptualizations of women influence jurists' interpretations of legal norms governing the economic sphere" and can inform the "jurist's sense of the scope or weight of a liberty interest" as well.[113]

A. The Gendered Bonds

When the *Lumley v. Gye* tripartite male-male-female dispute came before the court, the court interpreted it in a way that conformed with the legal precedents that featured these gendered scenarios. The application of gendered triangulation had two important consequences for the three members of the *Lumley v. Gye* dispute: it influenced the creation of the male-

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law, mirrors the economic, technological, ideological, and moral conditions that prevail in society at any given time . . . . The master ideas that drive tort doctrine—reasonableness, duty of care, and proximate cause—are as loose-jointed, context-sensitive, and openly relativistic as any principles to be found in law." PETER SCHUCK, TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND THE PUBLIC WELFARE 18 (1991)).

[107] Engel & McCann, *supra* note 104, at 7.

[108] Ann Scales, *"Nobody Broke It, It Just Broke": Causation as an Instrument of Obfuscation and Oppression, in* FAULT LINES, *supra* note 104, at 269, 278.

[109] *See* Leslie Bender, *Teaching Torts As If Gender Matters: Intentional Torts*, 2 VA. J. SOC. POL'Y & L. 115, 116 (1994).

[110] *See id.*

[111] Carolyn Strange, *Masculinities, Intimate Femicide and the Death of Penalty in Australia*, 1890–1920, 43 BRIT. J. CRIMINOLOGY 310, 313 (2003).

[112] *See generally* Hans, *supra* note 106 (discussing the capacity of the jury to influence tort law through their cultural understandings and background during the decision-making process).

[113] Peggy Cooper Davis & Carol Gilligan, *A Woman Decides: Justice O'Connor and Due Process Rights of Choice*, 32 MCGEORGE L. REV. 895, 902–03 (2001).

male tort bond, and it contributed to the court's understanding of the female-male contract as establishing an unequal relationship status, rather than as establishing a regime of private ordering between two subjects.

1. *The Male-Male Tort Bond*

Before the court decided *Lumley v. Gye*, there was no legal link between a promisee to a contract and a third party who persuaded a promisor to breach that contract.[114] The doctrine of privity of contract dictated that the only parties that could be held liable in relation to the contract were the parties to it. Quite properly, then, Gye, in his defense, circumscribed the case as "a wrong between the plaintiff and Johanna Wagner alone," for which the proper cause of action was only in contract, not tort.[115] The court rejected this defense, and created a legal link between the two men. The judges gave a legal dimension to the social and competitive bond that already existed between Lumley and Gye, and bound them in tort. Building on the actions of enticement, seduction, and criminal conversation, where courts gave the man with the prior relationship to the woman property rights over her, the court found that what Frederick Gye did was essentially a wrongful act, committed against Benjamin Lumley.[116] In keeping with the tradition established in these prior causes of action, the court interpreted Gye's actions in relation to Lumley, and saw his persuasion of Wagner as an attempt to insult and injure Lumley.

The wrongful act that the new *Lumley v. Gye* tort targeted was a type of impermissible competition, one that constituted a potentially dangerous challenge to another man's masculinity. Typically, "[n]ineteenth century courts defined competition as a privilege to struggle against other persons who sought the same product within the same market; to compete was to fight with equals for the same end."[117] This idea echoes some of the honor traditions seen in dueling; men generally would duel only with others of similar social status.[118] However, as is clear from the torts of seduction and criminal conversation, once a man had acquired property rights to a woman, other

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[114] *See* Sayre, *supra* note 48, at 667.

[115] Lumley v. Gye, (1853) 22 L.J.Q.B. 463 (Eng.) 466 (argument by Willes on behalf of Gye) (full argument by Willes not included in the English Reports).

[116] *See* Waddams, *supra* note 2, at 447. As Justice Erle stated: "The only distinction in principle between this case [concerning criminal conversation] and other cases of contracts is, that the wife is not liable to be sued: but the judgment rests on no such grounds; the procuring a violation of the plaintiff's right under the marriage contract is held to be an actionable wrong." Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 756 (Erle, J.).

[117] Note, *Tortious Interference With Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort*, 93 HARV. L. REV. 1510, 1532 (1980).

[118] VanderVelde, *Legal Ways of Seduction*, *supra* note 43, at 836.

men were prohibited from competing with him, and any exchange had to be voluntary.

By the time of *Lumley v. Gye*, the marketplace had emerged as an important locus of masculine competition. "Marketplace Masculinity," a way of relating marked by "aggression, competition, [and] anxiety—and the arena in which those characteristics are deployed—the public sphere, the marketplace," had become increasingly important since the 1830s.[119] Competition and interaction with other men in the context of the marketplace became a major source of masculine identity, and the marketplace became the most significant area for testing and proving manhood.[120]

The allegation that Gye somehow "took" Wagner from Lumley thus could easily have been read by the court as an allegation that Gye had behaved in a way that transgressed the normal bounds of competition and threatened another man's masculinity, just as criminal conversation or seduction would have done.[121] The court used the concept of malice as shorthand for this. Malice was an important issue circulating in the case, one that led subsequent courts to assume that it was in fact the gist of the action.[122] According to the custom of the time, malice meant actual malevolence.[123] Although malice was used "loosely" and with an "evident contrariety of meanings," the concept was used as a justification for legally binding the two men together.[124] The court used malice to indicate that where one man targeted another and intended to insult him by, in some sense, "taking" a woman from him, such an act could be legally wrongful.

2. *The Male-Female Contract Bond*

With regard to the male-male bond, the court took a relational bond and made it more powerful by giving it a legal dimension. It created a legal bond where none existed before, because it understood the wrong to be between the two men.[125] For the male-female contract bond, however, the court did the opposite. It took a contractual bond, and focused not on the *legal* significance of that bond, but on its *relational* significance. At least initially, Johanna Wagner was legally bound to Benjamin Lumley through their contract, and that contract should have been the sole basis for liability

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[119] Kimmel, *supra* note 37, at 83.

[120] *Id.* at 82.

[121] In discussing the principle behind this case, Justice Erle states that "the right of action in the master arises from the wrongful act of the defendant in procuring that the person hired should break his contract, by putting an end to the relation of employer and employed . . . ." Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 756 (Erle, J.).

[122] Sayre, *supra* note 48, at 672.

[123] *Id.*

[124] *Id.* at 673.

[125] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 757 ("He who maliciously procures a damage to another by violation of his right ought to be made to indemnify; and that, whether he procures an actionable wrong or a breach of contract.").

for any issues with her performance. However, because the law typically configured legal actions involving women as triangulated between two men, the contractual bond, which should have established a binary between two subjects, was sublimated to the gendered structure of the erotic triangle and the higher power of the relational bonds that tie women to men. These bonds were based not in contract, but in status relations, and under these status relations, women were subordinate to a more powerful male. Since the bond between Lumley and Wagner was viewed as unequal because of the gender of the parties, the court more easily equated that unequal bond with another: that of master and servant.

In the mid-nineteenth century, when *Lumley v. Gye* occurred, the old status-based regime was evolving into a new contract-based one.[126] In the early nineteenth century, a status-based regime reigned.[127] This regime was based on ascription, under which social positions are determined by ascribed characteristics, like sex, race, or ethnicity.[128] A status-based society perpetuates a "natural order of subjection," in which the law uses status as an ordering principle.[129] The more modern contract regime, on the other hand, supposes that people are not born into specific social stations, but rather can, as free and rational beings, make agreements that can shift their social positions.[130] They can define their own roles, and choose to enter or not enter into legally significant relationships with others.[131] A contract regime purports to represent "a civil order of freedom," and political modernity.[132]

Johanna Wagner had entered into a contract with Benjamin Lumley, an act that should have meant that they had agreed to a private ordering between them. As such, their private agreement should have governed the performance and breach of those obligations, subject to the applicable law. In a world of private contractual ordering, privity of contract should have limited the dispute to one between her and Lumley, and her breach should have rendered her solely liable for damages. *Lumley v. Gye*, however, represented a moment in which contract was unable to overcome status. Instead of being seen as a person with the freedom to make and break contracts, subject to the usual contractual liabilities, Johanna Wagner was viewed as a woman, whose very ability to enter those contracts was somewhat anomalous. The Lumley-Wagner-Gye erotic triangle was similar enough to the already established situations of enticement, seduction, and criminal conversation that Wagner

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[126] R. H. Graveson, *The Movement from Status to Contract*, 4 MOD. L. R. 261, 265 (1940).

[127] *Id.*

[128] *See* CAROLE PATEMAN, THE SEXUAL CONTRACT 10 (1988).

[129] Emily Zakin, *Beyond the Sexual Contract: Traversing the Fantasy of Fraternal Alliance*, *in* BETWEEN THE PSYCHE AND THE SOCIAL: PSYCHOANALYTIC SOCIAL THEORY 159, 160 (Kelly Oliver & Steve Edwin eds., 2002) (quoting PATEMAN, *supra* note 128, at 10).

[130] Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 636 (2007).

[131] *Id.*

[132] Zakin, *supra* note 129, at 160 (citing PATEMAN, *supra* note 128, at 9).

and Lumley's relationship could more easily be analogized to that of servant and master. The court noted that "where a party has contracted to give his personal services for a certain time to another, the parties are in the relation of employer and employed, or master and servant, within the meaning of this rule."[133] Because the court classified Wagner as a servant, her contractual relations were adjudicated under a separate set of standards from those applicable to the usual male-male contractual relations between equals. Shifting the blame to Gye implied that Wagner lacked legal subjectivity and "the capacity to decide to breach,"[134] despite the fact that she was technically able to enter into a contractual arrangement.[135]

Indeed, only a small subsection of women at the time had the power to enter into legally binding contracts at all. Married women were subject to the law of coverture, under which they did not have the independent legal personhood required for contracting by themselves.[136] Only an unmarried woman like Johanna Wagner could contract on her own behalf, and thus even the fact that she could become a party to an employment contract was relatively rare.[137]

Instead of being viewed as people with all the accoutrements of legal personhood, in the nineteenth century, there was a "culturally constructed barrier to conceiving of women as autonomous parties."[138] Women were understood as relationally bound to men: their identities and spheres of acceptable behavior were determined through their relationship to a more powerful male. Servants were bound to their masters, daughters were bound to their fathers, and wives were bound to their husbands. In *Lumley v. Gye*, a female performer was understood to be similarly bound, but this time to her male employer. She was not seen as an independent actor in a marketplace, able to control her own labor and act for her own economic gain, but instead as subordinate to the man she contracted with.[139]

In many contract cases involving female performers that occurred after *Lumley v. Gye*, the contractual/relational bond between female performers and their theatre-manager employers seemed to be conflated with a marriage

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[133] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 755 (Erle, J.).

[134] Elisa Masterson White, *Arkansas Tortious Interference Law: A Proposal for Change*, 19 U. ARK. LITTLE ROCK L.J. 81, 103–04 (1996).

[135] "It does not appear to me to be a sound answer, to say that the act in such cases is the act of the party who breaks the contract; for that reason would apply in the acknowledged case of master and servant." Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 755 (Erle, J.).

[136] SHANLEY, *supra* note 71, at 8.

[137] VanderVelde, *Gendered Origins*, *supra* note 3, at 777.

[138] *Id.* at 830.

[139] *Cf. id.* at 787 (discussing how artisans "occupied a niche between the higher status of partners and the lower status of indentured servants, apprentices, and slaves"). Wagner's status as a foreigner also likely affected how the court viewed her status. As VanderVelde notes, Lord Chancellor Lord St. Leonards seemed to target Wagner's status as a foreigner when he referred to "the maintenance of that good faith which exists in this country to a much greater degree perhaps than in any other." *Id.* at 792 n.81 (quoting Lumley v. Wagner, (1852) 42 Eng. Rep. 687 (Ch.) 693).

bond.[140] Theatre managers likely viewed their contractual relationships with their female employees not as merely commercial arrangements, but as marital ones.[141] Their confusion is not surprising given that the same word, "master," referred both to husbands and to employers.[142] The legal construction of the marital and employment relationships were closely related as well: they shared the same root, and "[s]tandard nineteenth-century legal treatises on domestic relations contained chapters on husband and wife next to chapters on master and servants."[143] The line between husband and employer was linguistically, culturally, and legally blurred, and female performers were seen as quasi-wives, subject to the will of their employers.[144]

As a quasi-wife, a female performer's contractual breach was more easily linked with adultery and infidelity.[145] Both breaches are marked by disobedience and activeness: contract performance, regardless of whether it is found in the commercial or marital context, is passive and obedient, whereas breach or nonperformance is active and disobedient.[146] Disobedience was a subversion of woman's gender role and a threat to the power of the master or husband; "[w]omen were expected to be obedient and subordinate."[147] Moreover, disobedience suggested a betrayal and the infliction of psychic injury upon the master or husband, an injury that was worsened if the disobedience was the result of a connection to a rival male.[148]

Through the close parallels between the Lumley-Gye-Wagner commercial triangle and the husband-rival-wife domestic triangle, elements of criminal conversation were able to seep into the construction of the tort. The common legal-cultural narrative of adultery colored the story of Johanna Wagner and the man to whom she was contractually bound. In fact, in *Lumley v. Gye*, one of the cases explicitly relied on to extend the application of the enticement action was *Winsmore v. Greenbank*, an action brought by a husband against a rival alleged to have disrupted his wife's services to him.[149]

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[140] *See id.* at 831.

[141] *See id.* VanderVelde notes that the negative injunction cases she studied did not have corresponding actions in interference with contractual relations. *Id.* at 844 n.368. This may be due to the fact that although Lumley was successful in the demurrer action, he ultimately lost the case at trial on the grounds that Gye genuinely believed that the Lumley-Wagner contract was terminated. *See* note 16, *supra*.

[142] *Id.* at 832.

[143] *Id.* at 831.

[144] Davis, *supra* note 102, at 14 (summarizing VanderVelde's argument in VanderVelde, *Gendered Origins*, *supra* note 3).

[145] VanderVelde, *Gendered Origins*, *supra* note 3, at 831.

[146] *See* Patricia J. Williams, *On Being the Object of Property*, 14 SIGNS 5, 13 (1988).

[147] VanderVelde, *Gendered Origins*, *supra* note 3, at 846.

[148] *See id.*

[149] (1745) 125 Eng. Rep. 1330 (C.P.).

> [I]t was prima facie an unlawful act of the wife to live apart from her husband; and it was unlawful, and therefore tortious, in the defendant to procure and persuade her to do an unlawful act . . . . This case appears to me to be an exceedingly strong authority in the present case.

Early cross-citations between cases involving criminal conversation erotic triangles and cases involving the *Lumley v. Gye* type of erotic triangle provide further evidence that the marital and commercial triangles were connected and conflated.[150] There was a commingling of the law regulating the intimate realm with the law regulating the economic realm in cases like *Duffies v. Duffies* (where the plaintiff's lawyer used *Lumley v. Gye* to argue that the action for enticing a spouse should not be restricted to husbands, but should also be available to wives as well);[151] *Burdick v. Freeman* (where the respondent's attorney cited *Lumley v. Gye* in the context of a criminal conversation action);[152] *Tasker v. Stanley* (where *Lumley v. Gye* was cited in an alienation of affections case);[153] and *Nolin v. Pearson* (where *Lumley v. Gye* was cited in support of the proposition that a wife should be able to bring a loss of consortium action against her husband's mistress).[154]

These cultural overlays on this male-female contractual bond prevented it from holding the power that a male-male contractual bond would have had—because one of the parties was a woman, the relation was more easily conflated with the marital one, and thus the rules that applied to that type of relationship were thought to appropriately apply to this one as well. Because gender affected "the character of the relationship," what should have been a contract between equals was interpreted more like a master-servant relationship.[155] Moreover, the male-male tort bond was given prominence in the dispute, and seen as more significant than the contractual connection. This is the basis for the tension between contract and tort visible in interference with contractual relations, and the reason why the doctrine of privity of contract was broken.

B. Causation and the Female Intermediary

The gendered nature of the bonds in *Lumley v. Gye* connects to another enduring problem of interference with contractual relations: the problem of *novus actus interveniens*. Normally, a human intermediary standing be-

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Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 758 (Wightman, J.).

[150] They also are an interesting example of how, despite the idea of separate spheres or hostile worlds that was developing at the time, the economic and the intimate realms were deeply entwined.

[151] 45 N.W. 522, 523 (Wis. 1890).

[152] 120 N.Y. 420, 423 (1890) (attorneys' arguments not printed in North Eastern Reporter).

[153] 26 N.E. 417, 418 (Mass. 1891).

[154] 77 N.E. 890, 891 (Mass. 1906). *See also* Plant v. Woods, 57 N.E. 1011 (Mass. 1900). The court noted that "procuring a wife to leave her husband" was based on the same general principle as inducement in a labor dispute context. *Id.* at 1014.

[155] John Danforth, *Tortious Interference with Contract: A Reassertion of Society's Interest in Commercial Stability and Contractual Integrity*, 81 COLUM. L. REV. 1491, 1496 (1981). He states: "two of the majority judges took care to note the details of Lumley's relationship with Wagner," and the "holding strongly suggested that the character of the relationship disrupted would determine whether one could be liable for interfering with another's contract."

tween a plaintiff and defendant will break the chain of causation, since the intermediary possesses free will and is responsible for making her own decisions.[156]

However, causation, like most other legal concepts, is a matter of cultural habit.[157] Rather than having independent logical content, causation is a flexible concept, and "[c]ause and effect can be defined and connected in a wide variety of ways, and attributions of such linkages are shaped (collectively and individually) by where one wants blame to end up."[158] It acts as a glue that allows us to "stick a defendant to a plaintiff" according to where one feels that fault lies.[159]

The precedents to *Lumley v. Gye* illustrate that our concept of causation is a malleable concept, one that is influenced by gender. Through actions in enticement, seduction, and criminal conversation, courts created the legal fiction that servants, children, and wives had no "free will independent of the master's."[160] Accordingly, causation was a non-issue in these cases: courts felt that the male rival was a wrongdoer, and they modeled the causation doctrine to comply with this belief.

In *Lumley v. Gye*, the majority of the court implicitly included this same idea. Johanna Wagner occupied a category—woman—that was closely adjacent to the categories of wife and servant, and so it was not difficult for the court to gloss over the problem of her intervening will. In fact, Judge Coleridge's dissent specifically pointed to the problematic nature of such a conflation. He noted that the law for causation in regard to wives was not applicable to the unmarried Johanna Wagner, and argued that while, in a criminal conversation action, "effectual persuasion to the wife to withdraw and conceal herself from her husband is in the eye of the law an actual withdrawing and concealing," this legal fiction should not have applied in the instance before the court.[161]

The court's focus on the rivalry between Lumley and Gye allowed the issue of causation to fade into the background. For if one concentrates "solely on the pursuers and their rights and privileges against each other, one avoids the questions of causation and indemnity that result from viewing those rights and privileges as channeled through the obligor or potential obli-

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[156] *See* DOUGLAS HODGSON, THE LAW OF INTERVENING CAUSATION 12–13 (2008); Benjamin L. Fine, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116, 1123 (1983).

[157] Scales, *supra* note 108, at 271–72 (explaining how questions of causation "depend upon an analysis of habits of inference" that are specific to each culture).

[158] David Nelken, *Law, Liability and Culture*, *in* FAULT LINES, *supra* note 104, at 21, 21.

[159] Scales, *supra* note 108, at 272.

[160] Note, *supra* note 117, at 1526.

[161] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.) 762 (Coleridge, J., dissenting).

gor."[162] The problem, though, is that rights and privileges *are* channeled through the obligor, and by "ignoring the fact that the decision to breach or not breach lies in the hands of the breaching party, we treat the breacher as being without will."[163] Holding someone liable for someone else's decision implies that the latter is not an autonomous being. It is incompatible with the understanding of a person as a "human being in charge of his or her own life."[164]

Today, we no longer accept legal fictions that deny the independent wills of servants and wives, yet no acceptable alternative rationale for this aspect of the tort has been offered. The intervening will issue remains an unsolved problem. Usually the issue is simply ignored; causation is rarely considered in its own right. Ultimately, one scholar advises, "a search for a well-defined causation analysis" for the tort will only end in frustration.[165] The oft-referenced Restatement (Second) of Torts gives only the briefest of guidance on this issue.[166] Case law typically provides a superficial application of the "but for" test and ignores issues which should be of great significance in determining liability, like the promisor's state of mind, and the evidentiary elements required to establish that state of mind.[167] Indeed, it is questionable whether the "but for" test is even an appropriate one.[168]

When the courts do provide a truncated analysis of causation, they often rely on proximate cause to establish the causation link.[169] The "but for" test is cursorily used first to establish cause in fact,[170] and then to establish proximate cause, which "concerns whether the law should impose liability after the evidence establishes cause in fact."[171] Prosser offers his opinion on the role of proximate cause in the tort:

> Some of the earlier decisions denying liability argued that the defendant's conduct can never be a proximate cause of the breach, since there is an intervening voluntary act of the third party promissor; but where that act is intentionally brought about by the defendant's inducement, or is even a part of the foreseeable risk

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[162] Benjamin L. Fine, *An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations*, 50 U. CHI. L. REV. 1116, 1125 (1983).

[163] Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 BUFF. L. REV. 645, 664 (1999).

[164] Dobbs, *supra* note 8, at 358.

[165] Orrin K. Ames III, *Tortious Interference with Business Relationships: The Changing Contours of This Commercial Tort*, 35 CUMB. L. REV. 317, 344 (2005).

[166] *Id.* (noting that causation is not listed as an independent element in the RESTATEMENT (SECOND) OF TORTS § 766 (1965)).

[167] *Id.* at 344–45.

[168] Wexler, *supra* note 1, at 299.

[169] Ames, *supra* note 165, at 344.

[170] *See id.* at 344.

[171] Steven W. Feldman, *Tortious Interference with Contract in Tennessee: A Practitioner's Guide*, 31 U. MEM. L. REV. 281, 310 (2001).

> which he has created, it seems clear that the result is well within the limits of the "proximate."[172]

This view, that proximate cause should entail that "a man might be held liable for any 'natural and probable' consequences of his actions even if there were human intermediaries," is problematic.[173] The legal gymnastics required to reconcile normal understandings of causation with the tort are best explained by simply realizing that the case continued the tradition of using the legal fiction that servants, daughters, and wives had no independent will that could break the chain of causation.

C. The Property Problem

In addition to the construction of causation, the legal predecessors to interference with contractual relations imported another problematic concept into the new tort—the way in which legal erotic triangles configured women as property. Proprietary interests underpinned the creation of interference with contractual relations.[174] Put bluntly, "[t]he tort grew out of a desire to protect the property interests people supposedly had in other people."[175] More specifically, it grew out of the desire to protect the property interests that men had in women. From a master's property interest in his female or male servant, and a father's property interest in his daughter, and a husband's property interest in his wife, came a man's property interest in a contractual relationship formed with a woman. In these predecessor torts, the property rationales were initially explicitly acknowledged, and so, too, in the case of interference with contractual relations. Gye's counsel "vigorously argued"[176] that, in order to succeed on the claim, Lumley "must have a property in the thing taken away,"[177] and the judges endorsed this view. By the early 1900s, courts often expressed their understanding that the basis of the tort was in protecting a property right.[178]

In 1853, giving a man a property right in a woman who was contractually bound to him was a relatively unremarkable proposition.[179] However, as cultural milieus changed and the idea that one person could hold property

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[172] PROSSER & KEETON ON TORTS, *supra* note 63, at 990–91 (footnotes omitted).

[173] Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, and a Prudential Response*, 38 ARIZ. L. REV. 1175, 1207 (1996).

[174] Waddams, *supra* note 2, at 449.

[175] Wexler, *supra* note 1, at 284.

[176] Waddams, *supra* note 2, at 447.

[177] Lumley v. Gye, (1853) 22 L.J.Q.B. 463 (Eng.) 466 (argument by Willes on behalf of Gye) (full argument by Willes not included in the English Reports).

[178] *See* Fred McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131, 141 n.38 (1992) (collecting cases).

[179] As discussed *supra* in Part II.C.2–3, it was standard that a male head of a household would have proprietary rights in his wife, offspring, and servants. It was not a far stretch to extend this to contracted female employees.

rights in another became abhorrent, a new rationale was needed to justify the tort of interference with contractual relations. Many of these new justifications were rooted in notions of property, but highlighted proprietary rights in contractual performance, rather than a contracting party. In modern cases, courts frequently express the idea that promisees have proprietary rights in the performance of contracts; however, they do not explain how, or why, the performance of the contract should have this quality.[180]

The High Court of Australia deftly illustrates the circularity of the reasoning often employed:

> [the theory that contractual rights are quasi-proprietary] seeks to answer the question: "Why is a plaintiff's right to performance of a contract protected against third party interference?" It gives the answer: "Because it is quasi-proprietary." But that raises the question: "Why is it quasi-proprietary?" The answer is: "Because it is protected against third party interference."[181]

Many scholars have posed justifications for the tort that are rooted in property, but no argument has convincingly articulated why a contractual right that is normally only effective against other parties should suddenly become a property right against anyone who induces another to breach.[182] In their defense, that is no easy task. Property conceptions are not the finest of analytical tools:

> Once it is recognized that property is a social construct rather than a transcendental phenomenon, it must become apparent that the concept is limited both in its content as well as analytic value. Ultimately, the decision to confer proprietary protection on a particular resource or interest calls for a thorough and explicit examination of the *nature* of the interest as well as the relevant *policy* considerations. By itself, property talk is neither a sufficient nor a useful substitute.[183]

Recognizing the bias built into the tort of interfering with contractual relations reveals why it cannot be explained in a way that reconciles current conceptions of property with the autonomy of all the individuals involved.

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[180] *See, e.g.*, Duggin v. Adams, 360 S.E.2d 832, 835 (Va. 1987) ("A party to a contract has property rights in the performance . . . .").

[181] *Zhu v Treasurer of NSW* (2004) 218 CLR. 530, 573.

[182] *See, e.g.*, Richard Epstein, *Inducement of Breach of Contract as a Form of Ostensible Ownership*, 16 J. LEGAL STUD. 1 (1987) (arguing that the inducement tort is "best understood as an unsuspected manifestation of the problem of ostensible ownership"); Lilian BeVier, *Reconsidering Inducement*, 76 VA. L. REV. 877 (1990) (explaining some shortcomings of Epstein's property-based approach); and Fred McChesney, *Tortious Interference with Contract Versus "Efficient" Breach: Theory and Empirical Evidence*, 28 J. LEGAL STUD. 131 (1999) (connecting the tort to assignability rights in contract).

[183] Pey-Woan Lee, *Inducing Breach of Contract, Conversion and Contract as Property*, 29 O.J.L.S. 511, 518 (2009).

Indeed, the property-based theory with the most explanatory power is that of Benjamin Fine, which proposes that the most important relationship in the tort is that between the promisee and the interferor, or the two rivaling men in the *Lumley v. Gye* scenario.[184] Fine suggests that a pursuer of an economic good has a right of pursuit that runs against the world, and that scholarship on the tort "has incorrectly emphasized the relationship between the obligee and the obligor, or prospective obligee or obligor."[185] Instead, he argues, the focus should be on "the obligee and the interferor as competing pursuers of the same economic good, the performance of the obligor."[186] He analogizes the obligee and the interferor to hunters of wild animals, and finds parallels between the moment a hunter acquires property rights over an animal, and the moment one acquires contractual rights.[187] Property rights begin to vest as soon as the hunter can demonstrate some control over the animal. Once the hunter can do this, other hunters may not also pursue the animal. While Johanna Wagner is obviously not an animal, the analogy is a good one. Focusing on the promisee and the interferor reveals much about the problematic property assumptions inherent in the tort. "At least symbolically," the structure of the tort continues to configure the promisor as the property of the promisee.[188]

III. Problematic Applications of the Tort

Interference with contractual relations treats the original promisee and the new promisee as competitors for the same economic good, but in so doing, it ignores the fact that the "economic good" in question is often someone else's labor. Through its structure, the tort commodifies the original promisor and her labor, and this commodification eclipses the personhood of the original promisor such that the tort can be used in ways that conflict with her autonomy and freedom of contract, as well as her ability to control her own labor. Contract and tort law "define the weapons that parties may deploy in competition or bargaining . . . [and] shape the relative bargaining power of social actors."[189] In America, the tort traditionally empowered employers; it became an important part of "a formidable body of legal principles that systematically favored employers in litigation with employees."[190] As the tort developed and evolved, it was applied in many problematic contexts for nefarious purposes. It was used to oppress

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[184] *See generally* Fine, *supra* note 162.
[185] *Id.* at 1125.
[186] *Id.*
[187] *Id.*
[188] Dobbs, *supra* note 8, at 359.
[189] John Fabian Witt, *Rethinking the Nineteenth-Century Employment Contract, Again*, 18 Law & Hist. Rev. 627, 628 (2000).
[190] *Id.* at 635.

marginalized groups by restricting labor mobility and prevent workers from advancing their economic interests or gaining any upward mobility.

A. Racial Oppression

In America, some of the early cases rejected the *Lumley v. Gye* tort.[191] Soon, though, legal actors recognized that the tort was a useful tool for oppressing recently freed slaves in the American South.[192] There, the tort was enlisted to perform tasks similar to those performed by the enticement action in the Statutes of Labourers.[193] Specifically, it was used to prevent labor mobility, and the attending social and economic mobility that would accompany free labor movement.[194]

The Civil War and its attendant abolition of slavery in the 1860s was an "economic disaster" for Southern white plantation owners.[195] The former slaves had a newfound market power: the plantation owners desperately needed agricultural labor, and, accordingly, the former slaves began to command real market wages, as opposed to the "implicit subsistence wage of slavery."[196] In order to prevent worker mobility and push down wages, white landowners formed cartels, and when those were unsuccessful, the landowners enlisted the aid of interference with contract to prevent workers from finding better opportunities.[197]

Indeed, shortly after the Thirteenth Amendment was ratified in 1865, North Carolina passed a statute called "An Act to Prevent Enticing Servants from Fulfilling Their Contracts or Harboring Them."[198] The Act provided that servants and the persons who either enticed them away or harbored them could be sued jointly and singly, and, if liable, would be responsible for "the actual double value of the damages assessed."[199] In Georgia, eight days after the Thirteenth Amendment was ratified, one plantation owner had

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[191] Danforth, *supra* note 155, at 1496 (citing Kline v. Eubanks, 33 So. 211 (La. 1902) (holding that there is no liability for inducing breach of contract); Boyson v. Thorn, 33 P. 492 (Cal. 1893) (endorsing Coleridge's dissenting opinion in Lumley v. Gye); Boulier v. Macauley, 15 S.W. 60 (Ky. 1891) (refusing to apply legislation it interpreted as restricted to farm laborers to a female performer).

[192] David F. Partlett, *From Victorian Opera to Rock and Rap: Inducement to Breach of Contract in the Music Industry*, 66 TUL. L. REV. 771, 784–85 (1992) (comparing the labor shortage caused by the emancipation of slaves after the Civil War to that of the labor shortage in England during the Plague).

[193] Statute of Labourers, 1351, 25 Edw. 2, St. 1, c. 1; Partlett, *supra* note 192, at 784–85.

[194] Partlett, *supra* note 192, at 784–85 n.50.

[195] DAVID E. BERNSTEIN, ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS, AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL 8 (2001).

[196] *Id.*

[197] *Id.* at 9.

[198] 1866 N.C. Sess. Laws 122.

[199] *Id.* at 123.

already hired his former slaves on as employee/servants.[200] When a neighbor persuaded the former slaves to work for him instead, the plantation owner successfully brought an action against his neighbor.[201] In some states, enticement laws took the tort action one step further and criminalized the hiring of a worker who was already under contract.[202]

Even the former slaves who chose to stay on the same plantation under the new regime of sharecropping were restricted by the tort. Egalitarian and cooperative sounding, the sharecropping system allowed former slaves to perform agricultural labor on the same land they once did, though this time they were compensated with some of the crop.[203] Theoretically, they also should have been free to move between lands, to seek out better returns for their labor. Soon, however, the potential of *Lumley v. Gye* to keep these workers in their place, both literally and figuratively, became apparent. Southern states quickly took advantage of the doctrine by classifying the former slave sharecroppers into the same category as contract service providers.[204] Once so defined, the *Lumley v. Gye* tort ensured that at-will contracts could effectively stifle the mobility of these workers.[205] Other landowners would face tortious liability if they encouraged workers to leave their former master's employ, leaving the former slaves with few options. Essentially, the contract and tort combination became "a means of perpetuating slavery under a different name."[206]

Courts were careful to distinguish the tort from the institution of slavery, and specifically denied that the tort was rooted in the idea that people could have property rights in others. Instead, they claimed that the tort was "not derived from any idea of property by the one party in the other, but [was] an inference from the obligation of a contract freely made by competent persons."[207] Despite these denials, however, "many of the early American decisions involving interference with contracts concerned newly freed black sharecroppers" and the contract/tort regime became an effective means of coercion.[208] The "ability to work and to sell one's labor in the

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[200] Remington, *supra* note 163, at 657 n.30 (describing Salter v. Howard, 43 Ga. 601 (1871)).

[201] *Id.*

[202] *See* BERNSTEIN, *supra* note 195, at 10.

[203] Partlett, *supra* note 192, at 784 n.50.

[204] *See, e.g.*, Haskins v. Royster, 70 N.C. 601, 611 (1874) ("By cropper, I understand a laborer who is to be paid for his labor by being given a proportion of the crop . . . . He is as much a servant as if his wages were fixed and payable in money.").

[205] *Id.*

[206] *Id.* at 784–85 (quoting Barry Sullivan, *Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 YALE L.J. 541, 556 (1989)).

[207] *Haskins*, 70 N.C. at 605.

[208] Note, *supra* note 117, at 1525 n.72. The Note further explains how *Haskins* exemplified the way the contract/tort regime coerced sharecroppers:

> For example, the black "servant" in *Haskins* stipulated in his contract against his and his family's "insolence" towards the white landowner. For disrespectful behavior towards him, the plaintiff retained the power at any time to eject the share-

market is, for most individuals in American society, the most significant resource that they own and control," and the tort fundamentally impacted that ability.[209] As was stated by Lord Lindley in *Quinn v. Leathem*, "a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him."[210] By deterring alternative employers, the tort decreased the possibility of more lucrative alternative employment for former slaves.[211] Also by decreasing the potential for alternative employment, the tort impacted the right to quit.[212] "The right to quit is the antithesis of slavery. Being able to quit is the minimal means of guarding against unduly oppressive labor conditions and is fundamental to controlling one's person and one's labor."[213] When the possibilities of alternative employment are taken away, there is little freedom to quit, and little opportunity to raise one's economic lot.

B. Suppression of Labor Movements

Former slaves were not the only workers who were subjected to the tort's coercive effects.[214] "The German sociological tradition has long taught us to see in the legal protection of property rights a source of coercive power over the working classes," and this form of protection of property rights was no exception.[215] Marx, in particular, raised questions of power and equality in connection with contract, and suggested that "power struggles between

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cropper and his family from "their houses, and to take to himself the whole of their labor and crop." 70 N.C. at 616–17 (Reade, J., dissenting). And, as the dissent pointed out, even a slave had a right to be fed and clothed, whereas the cropper was responsible for meeting his own material needs. *Id.* at 618.

[209] VanderVelde, *Gendered Origins*, *supra* note 3, at 783 n.34.

[210] Quinn v. Leathem [1901] A.C. 495 (H.L.) 534 (appeal taken from Ir.) (Lindley, L.J.).

[211] Law and economic scholars also provide a theoretical basis for understanding how incentives and deterrents work in the tort. Harvey Perlman explains that the tort deters the breach of contracts to the extent that a third person may be less likely to make a better offer to a promisor, since the possibility of tort damages being imposed upon him will mitigate his potential gain from the agreement. Perlman, *supra* note 8, at 83–84. The possibility of punitive damages, too, will weigh heavily against the production of a better offer. BeVier, *supra* note 182, at 917.

[212] VanderVelde, *Gendered Origins*, *supra* note 3, at 794.

[213] *Id.*

[214] In the United Kingdom,

> strikes feature in about 40 per cent of all the reported cases in which *Lumley* has provided the basis of a cause of action. Another 20 per cent of the reported cases concern other issues arising out of employment or personal services contracts. Typically they concern employers who lure away employees who have special skills or confidential information. The remaining 40 per cent cover a variety of commercial contexts, including trade boycotts and rent strikes . . . .

David Howarth, *Against* Lumley v. Gye, 68 MODERN L. REV. 195, 197 (2005) (footnotes omitted).

[215] Witt, *supra* note 189, at 628.

capitalists, the bourgeoisie, and workers resulted in more freedom for some contracting parties than others."[216] The tort initially ensured that the contracting employers retained more freedom than the contracting employees: it was used as a tool against many members of the working class to "enforce compulsory labor" and suppress labor unions.[217]

The tort's role in suppressing organized labor is significant, and was "[o]ne of the factors that propelled the development of the interference tort . . . ."[218] Employers often used interference with contractual relations to thwart union organization.[219] Union organizers, on the other hand, were usually unable to successfully rely on the action: "[w]hile combinations of businessmen that destroyed the livelihood of nonmembers were tolerated, unions that inflicted similar harm as a means to increase bargaining power rather than as an end were found to have engaged in intimidation and duress."[220] So-called yellow-dog contracts, were also closely connected to this cause of action. These contracts, in which an employer provided employment on the basis that the employee agreed not to join a union, were called yellow-dog contracts in order to express "connotations of animal servitude as opposed to human dignity."[221] In *Hitchman Coal and Coke v. Mitchell*, a 1917 decision of the United States Supreme Court, the Court upheld an injunction prohibiting a union from interfering with the yellow-dog contracts at two coal mines.[222] This precedent encouraged other employers to avoid unions by entering into similar contractual arrangements with their employees.[223]

C. Restriction on Employee Mobility

Non-unionized employees have also been negatively affected by the tort. In fact, in 2000, a California court refused to allow an employer's action in contractual interference specifically because of the conflict between the tort and labor mobility.[224] The court noted that California had a "strong public policy in favor of employee mobility," and there was "something

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[216] Ertman & Williams, *supra* note 47, at 3.

[217] PROSSER & KEETON ON TORTS, *supra* note 63, at 979.

[218] Remington, *supra* note 58, at 705.

[219] Indeed, efforts to subvert union activity prompted the expansion of interference with contractual relations into interference with non-employment related agreements and prospective agreements in the late nineteenth century. *See* Note, *supra* note 117, at 1511.

[220] *Id.* at 1533 (footnotes omitted).

[221] DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW: TEXTS AND CASES 8 (14th ed. 2010).

[222] *Id.*

[223] *Id.*

[224] GAB Bus. Servs., Inc. v. Lindsey & Newsom Claim Servs. Inc., 99 Cal. Rept. 2d 665 (2000), *overruled by* Reeves v. Hanlon, 95 P.3d 513 (2004). *See* Jeffrey Kramer, *Practice Tips: The Risks of Recruiting At-Will Employees*, 27 LOS ANGELES LAW. 19 (2005) (discussing California cases, including *GAB Bus. Servs* and *Reeves*, and their evaluation of the tort with respect to at-will employee contracts).

inherently suspect about a tort that, at bottom, concerns an employee's voluntary departure from employment."[225] While this case was eventually overruled by the California Supreme Court, the Appellate Court's initial declaration of a public policy against such a claim demonstrates some of the discomfort surrounding the tort. By imposing damages on the next employer to hire a departing employee, the "practical effect of this tort is to decrease the value to prospective employers of an employee under contract, rendering the employee more likely to remain with her current employer."[226] Further, the tort stifles an employee's ability to voice dissatisfaction and raise grievances, since there are fewer "substitute employment opportunities" as a result of the tort's deterrent properties.[227]

While many states have circumscribed the application of interference with contractual relations in the employment context, a new employer can still be liable for inducement if the new employee was contracted for a specific term.[228] Cases like *CRST Van Expedited, Inc. v. Werner Enterprises, Inc.*,[229] *Tata Consultancy Services v. Systems International, Inc.*,[230] and *CompuSpa, Inc. v. International Business Machines Corp.*,[231] serve as examples of situations where employers brought actions against the new employers of their former employees, alleging interference with contract. These cases highlight the tort's continuing problematic applications.

IV. Restructuring the Triangle

The old torts of enticement, seduction, and criminal conversation were explicitly based on the idea that men had property rights to their servants, daughters, and wives. When it became culturally unacceptable to speak of one person holding property rights in another, however, the arguments regarding the rationales for these torts shifted. Legal figures turned to other justifications for the torts of seduction, criminal conversation, and the similar American tort, alienation of affections.[232] For instance, by the early twentieth century, courts no longer explained the tort of seduction using a property rationale. Instead, they cited the "'moral and emotional investment in sexual chastity . . . as a legally protected interest' compensable with hard

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[225] *Id.* at 667.

[226] Christopher T. Wonnell, *The Contractual Disempowerment of Employees*, 46 Stan. L. Rev. 87, 96 (1993).

[227] VanderVelde, *Gendered Origins*, *supra* note 3, at 851.

[228] *See* Rudolf Callman, Callmann on Unfair Competition, Trademarks and Monopolies, § 9.22 (4th ed. 2009); Wonnell, *supra* note 229, at 96.

[229] 479 F.3d 1099 (9th Cir. 2007) (holding that, in a claim for intentional interference with the contract of non-at-will employees, the former employer does not have to allege wrongful act beyond solicitation of employees and knowledge that the contract existed).

[230] 31 F.3d 416 (6th Cir. 1994) (noting that Michigan state law requires allegation of malice and/or wrongful act for liability to attach in an interference with contract action).

[231] 228 F. Supp. 2d 613 (D. Md. 2002) (discussing the differences in the state laws of New York and Texas with respect to the tort of interference with contract).

[232] Greenstein, *supra* note 29, at 735–36 & n.72.

currency."[233] Criminal conversation underwent a similar conversion, and the rationale espoused morphed into "the protection of the marriage relationship and the larger marital institution from outsiders . . . ."[234] Alienation of affections, an American tort that allows a jilted spouse to sue someone alleged to have caused the loss of affection, also lost its property rationale in favor of a justification based on the plaintiff's interest in marital exclusivity and consortium, rather than the plaintiff's property interest in his spouse.[235]

Once the property rationales were abandoned, though, few of the new rationales were compelling enough to justify the continuations of these torts, and they have disappeared from most jurisdictions.[236] Because these legal erotic triangles were based upon regulating the exchange of women as the property of men, the torts simply could not overcome their deeply offensive genesis. As one scholar phrased it, "to retain a tort that originated from a husband's exclusive right to his wife's sexuality arguably promotes disrespect for the law."[237]

Through its gendered beginning, interference with contractual relations participated in this legacy of regulating homosocial relationships between men in a way that ensured women and other members of subordinated status would remain in that subordinated status. The particular status of Johanna Wagner as an unmarried woman was viewed through a cultural lens as enough like a wife or servant to be easily associated with the legal structures that applied to them. Once she had served as the first step down the path of expansion, the door was open to apply the tort to other people, including men in traditionally subordinated groups. Now, of course, the tort is available to all. But its offensive past as a highly effective tool of oppression gives us reason to ask, "[have] the old malevolent purposes . . . been replaced with modern rectitude . . . [o]r, does some of the evil remain, albeit more disguised?"[238]

Even without considering how gender has structured interference with contractual relations, many scholars have suggested that the problems inherent in it warrant at least a major renovation.[239] When these arguments are combined with an understanding of its gendered genesis and subsequent development as a tool of subordination, there is a compelling basis to argue that this tort should travel the same path as torts like criminal conversation.

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[233] *Id.* at 731 (quoting Larson, *supra* note 13, at 385).

[234] *Id.* at 735.

[235] *Id.* at 731–32.

[236] *See* Patel, *supra* note 87, at 1014 n.13, for a list of states that abolished the heartbalm torts.

[237] Caroline L. Batchelor, *Falling Out of Love with an Outdated Tort: An Argument for the Abolition of Criminal Conversation in North Carolina*, 87 N.C. L. Rev. 1910, 1931 n.157 (2009).

[238] Wexler, *supra* note 1, at 328.

[239] *See, e.g.*, Gary Myers, *The Differing Treatment of Efficiency and Competition in Antitrust and Tortious Interference Law*, 77 Minn. L. Rev. 1097, 1100 (1993) ("[T]he law of [tortious interference] gives excessive protection to tenuous contractual relationships at the expense of competition and efficiency.").

However, given that judicial and legislative bodies have not responded to the already persuasive academic call for abolition or abandonment, it seems unlikely that this tort will soon fade away.[240]

In the meantime, it is possible to reshape the tort in a way that erases its gendered components and resolves its most problematic aspects. The tort should be reconceived as one of "mixed joint liability."[241] Under this view, which was championed by the House of Lords in one of their final cases, the tort relies on the general principle that one "who procures another to commit a wrong" shares liability for that wrong.[242] The inducer is liable because he has participated in the underlying breach, not because he has done some independent wrong vis-à-vis the plaintiff. Instead of the original promisor serving as a conduit between the relationship of the plaintiff and defendant, the promisor is elevated to the status of an active subject in the dispute. The causation problem, the property problem, and the relationship between the tortious and contractual aspects of the tort are clarified in this new conception of the tort as a form of mixed joint liability. Further, this view advocates limiting damages to those available in contract in order to reflect a non-gendered understanding of the nature of the injury.

A. Mixed Joint Liability

Joint liability holds persons liable for wrongful acts in which they actively participate, encourage, or help to bring about. Prosser outlines the basis of liability:

> [a]ll those who, in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for the benefit, are equally liable.[243]

While the concept of sharing in liability through participation or knowing involvement in an underlying tort is well-known to tort law, normally joint tortfeasance means that two parties are jointly responsible for the same

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[240] Kyle Graham has an interesting take on why interference with contractual relations has endured and will continue to do so. Kyle Graham, *Why Torts Die*, 35 FLA. ST. U. L. REV. 359, 389 (2008) (noting, among other things, that "[t]he tort singles out no one industry or cohesive group for liability, while all can envision how the theory could be useful to them in the proper situation").

[241] The term and concept of "mixed joint liability" comes from GLANVILLE L. WILLIAMS, JOINT TORTS AND CONTRIBUTORY NEGLIGENCE § 1 (1951), *noted in* HAZEL CARTY, AN ANALYSIS OF THE ECONOMIC TORTS 72 (2001). In *O.B.G. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1 (H.L.) 19 (appeal taken from Eng.), the House of Lords (which was then still serving a judicial function) endorsed a similar justification for the tort, referring to it as accessory liability.

[242] O.B.G. v. Allan, [2007] UKHL 21, [2008] 1 A.C. 1 (H.L.) 19 (appeal taken from Eng.).

[243] PROSSER & KEETON ON TORTS, *supra* note 63, at 323 (footnotes omitted).

tort.[244] In the case of interference with contractual relations, the participation is not in another's tort. Instead, the underlying wrong is a breach of contract. Technically, then, an inducer and a promisor cannot be joint tortfeasors, because "breach of contract is not a tort," and therefore the promisor is not a tortfeasor at all.[245] Further, joint liability usually results in shared liability for the same tort, not liability for a separate tort of inducing or procuring.

If the underlying wrong is a breach of contract, how can the inducer, who is not a party to the contract nor under any duty of performance in regards to it, nevertheless be liable for breach? Liability attaches because the inducer's intentional and knowing participation in the breach makes it appropriate for the inducer to share in the responsibility for it as a type of mixed joint liability. Importantly, a rights-based view of the tort supports the imposition of liability in this way: "[t]he induced contracting party has violated a right of the plaintiff and the defendant comes to be responsible for that violation since he or she has participated in a meaningful way in the violation by procuring it."[246]

Adopting this new conception of the tort requires only a relatively small doctrinal shift. The tort's elements would be the same as those already required by the restrictive view of the tort applied in many jurisdictions. Generally, there must be an enforceable contract, the promisor must breach that contract, the interferor must have knowingly induced or participated in that breach, and the promisee must have suffered damage as a result.[247]

The first element limits this tort to breaches of enforceable contracts. This is because unless a right of the plaintiff has been violated, it does not make sense to speak of the defendant's participation in that violation. Many jurisdictions, including New York, Maryland, Idaho, and Georgia already contain such a requirement.[248] Also, there must be an actual breach of that contract, not a mere disruption.[249] This will limit the scope of the tort and achieve the goal of restricted applicability that many scholars have sug-

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[244] Lee, *supra* note 183, at 521.

[245] William M. Landes & Richard A. Posner, *Joint and Multiple Tortfeasors: An Economic Analysis*, 9 J. LEGAL STUD. 517, 553 (1980).

[246] Neyers, *supra* note 9, at 170.

[247] *See*, *e.g.*, NBT Bancorp Inc. v. Fleet/Norstar Financial Group, Inc., 664 N.E.2d 492, 496–98 (1996).

[248] Remington, *supra* note 58, at 651 n.11. The jurisdictions that allow at-will or voidable contracts to form the basis for these claims have sometimes been criticized. *See* Donald C. Dowling, Jr., *A Contract Theory for a Complex Tort: Limiting Interference with Contract Beyond the Unlawful Means Test,* 40 U. MIAMI L. REV. 487, 502–03 (1986).

[249] *See* Wexler, *supra* note 1, at 300 (discussing how California accepts a mere disruption, whereas New York requires a breach for damages to be awarded).

gested.[250] Again, there is a precedent for this restriction: New York and Connecticut already require a breach as an element of the tort.[251]

The requirement that the interferor must knowingly have induced or participated in the breach includes an element of intentionality: the defendant must know both that the contract exists and that she is participating in a breach of it. The level of participation required should be the same as the level generally required in cases of joint tortfeasance or aiding and abetting. In particular, inducement, and active encouragement or help will suffice, as will active participation, or ratification or adoption of the acts for the defendant's benefit.[252] Of further note, malice or a bad motive is not a relevant consideration in this inquiry.

Impropriety, other than participating in another's breach of duty, is not required under this version of the tort. This avoids the problems associated with the remarkably vague "improper" standard set out in the Restatement (Second) of Torts.[253] The troublesome nature of the current "improper" element is perhaps best illustrated in the following aptly articulated complaint against the tort: it is "a rather broad and undefined tort in which no specific conduct is proscribed and in which liability turns on the purpose for which the defendant acts, with the indistinct notion that the purposes must be considered improper in some undefined way."[254] The standard of impropriety established in the purportedly unworkable seven-factor analysis set out in the Restatement (Second) of Torts has proven to be impossible to apply consistently.[255] In contrast, a requirement of participation that does not depend on the propriety or impropriety of the involvement will give the tort more certainty in application.

Case law indicates that there is already some movement towards thinking of the tort in terms of joint tortfeasance, for courts sometimes use the language of joint tortfeasance when discussing it. For example, in *TABFG,*

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[250] *See* William J. Woodward Jr., *Contractarians, Community, and the Tort of Interference with Contract*, 80 MINN. L. REV. 1103, 1118 nn.53–54 (1996) (citing Perlman, *supra* note 8, at 97–129; Epstein, *supra* note 182, at 21–26) (noting that many scholars have argued in favor of "drastically scaling back the tort").

[251] *See* Wexler, *supra* note 1, at 297–98 (citing Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445 (N.Y. 1979); Solomon v. Aberman, 493 A.2d 193 (Conn. 1985)) (discussing how both jurisdictions require a breach of a valid contract as a necessary element of the tort).

[252] PROSSER & KEETON ON TORTS, *supra* note 63, at 323.

[253] RESTATEMENT (SECOND) OF TORTS § 766 (1979). As Gary Myers notes, the seven-factor "improper" standard "permits liability based on a vague and subjective standard." Myers, *supra* note 239, at 1111.

[254] PROSSER & KEETON ON TORTS, *supra* note 63, at 979.

[255] *See* Wexler, *supra* note 1, at 295 ("Every case turns out to be essentially an ad hoc determination, since '[t]he decision . . . depends upon a judgment and choice of values in each situation.'") (citing RESTATEMENT (SECOND) OF TORTS § 767 cmt. b (1979)); BeVier, *supra* note 182, at 884 ("Nor, apparently, are the factors themselves susceptible to coherent analysis . . . . [T]he dispositive question of whether any particular inference is 'improper' is to be decided by reference to seven factors of uncertain content and unspecified relevant importance.").

LLC v. Pfeil, the court referred to the defendant's argument that one of the alleged breaching promisors should have been included in the action as essentially an argument that "all joint tortfeasors must be named in the action,"[256] and in *Skelly v. Richman*, too, the court noted that the promisor and the inducer were "somewhat in the status of joint tortfeasors."[257] Also, a Georgia statute makes a party who has maliciously procured a breach of contract jointly liable for the breach.[258]

This new view of the tort clarifies what the interferor must do to attract liability, simplifies the relationship between contract and tort principles, avoids the causation problem associated with the current conception of the tort, and does not treat the promisor as the property of the promisee. It acknowledges the promisor's role in the breach by treating both the promisor and the interferor as liable together. Rather than replicating a triangular structure, this vision of the tort would create a two-party structure, with both the inducer and the promisor as autonomous actors. Each party is responsible for her own actions and held to account for her own decisions.

The new view also avoids the significant difficulties associated with viewing the tort as rooted in property. Whereas a conception of the tort as involving property rights "places burdens on strangers" to respect other people's contracts, the joint liability view simply says that liability will attach to active participation in the breaches of others.[259] The participation in the breach is more consistent with the "basic private law principle that the only person on whom liability is to be foisted is the person who it can be said has infringed the plaintiff's right,"[260] since the promisor and the interferor have together infringed the plaintiff's right.

This view also accords well with the treatment of breaches in contract law. "[T]he law attaches no stigma or special sanction to a contracting party who for economic reasons chooses to breach. If breaching a contract is not itself blameworthy, then '[t]o hold an inducer liable, his behavior must be at least as culpable as that of the breaching promisor; to impose a liability rule more onerous than that imposed on the promisor, the inducer must be more culpable.'"[261] This form of joint liability holds an inducer liable to the same extent the breaching party is held liable, because the inducer has participated in the breach in a way which makes him as culpable as the breaching party.

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[256] No. 08 C 6979, 2009 U.S. Dist. WL 1209019, at *1–3 (N.D. Ill. May 1, 2009).

[257] 89 Cal. Rptr. 556, 565 (1970).

[258] GA. CODE ANN. 51-12-30 (2001) ("In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury.").

[259] Neyers, *supra* note 9, at 164.

[260] *Id.*

[261] Dowling, *supra* note 248, at 512 (citing Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461–64 (1897); quoting Perlman, *supra* note 8, at 93).

B. Damages in Contract

Gender issues heavily influence how injuries are understood and valued. The gender of the plaintiff, in particular, impacts how the law will conceptualize the harm.[262] As we saw in *Lumley v. Gye*, the idea that interference with contractual relations should attract tort damages grew out of the court's understanding of the injury as more than just a mere breach of contract. The injury was arguably understood as a psychic injury to masculine identity similar to the kind of injury a cuckolded husband or father of a seduced daughter might experience. Just as the damage awards for the cuckolded husband and the father of a seduced daughter may have been very high to compensate for the perceived severity of the emotional and moral injury inflicted upon the plaintiff by another man, the suggestion in *Lumley v. Gye* was that this similar injury could attract a similarly high damage award.[263]

Since Justice Erle's bare pronouncement in *Lumley v. Gye* that contractual remedies may be inadequate and that the inducer "might justly be made responsible beyond the liability of the contractor,"[264] the question of the appropriate measure of damages for interference with contractual relations has received little attention.[265] Courts typically analogize the situation to those of other intentional torts, and reason that like those torts, a plaintiff's damages should not be restricted.[266] Interference with contractual relations can result in the usual spectrum of tort damages: damage awards can compensate emotional and reputational harms to the plaintiff, the pecuniary loss of the benefits of the bargain, and the consequential losses legally caused by the interference.[267] Damages for loss of profits are frequently awarded.[268] Also, because the damages are in tort, punitive damages are possible.

In contrast, the promisor's liability is limited to the damages regularly available under contract law. This is because the cause of action against the promisor is framed as a contractual, rather than tortious harm. The action in contract against the promisor does not limit a plaintiff's ability to bring an action for tortious interference, but any actual payments made by the promisor in settlement of the contractual claim must be deducted from any tort award against the interferor.[269] Since the damages for breach are common to

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[262] *See, e.g.*, Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 464–65 (1997); Chamallas & Kerber, *supra* note 86, at 814; Viviana A. Zelizer, *The Purchase of Intimacy*, 25 LAW & SOC. INQUIRY 817, 828 (2000).

[263] Larson, *supra* note 13, at 384 n.35.

[264] Lumley v. Gye, (1853) 118 Eng. Rep. 749 (Q.B.), 757 (Erle, J.).

[265] *See* PROSSER & KEETON ON TORTS, *supra* note 63, at 1002.

[266] *See* Myers, *supra* note 239, at 1118.

[267] RESTATEMENT (SECOND) OF TORTS § 774A (1979).

[268] *Id.* at cmt. b.

[269] The plaintiff's available action for breach of contract against the third person does not prevent an action in interference against a third party. The two are considered wrongdoers, and each may be liable to for the harm caused to him by the loss of the benefits of the contract. RESTATEMENT (SECOND) OF TORTS § 766 cmt. v (1979). However, "since

both actions, there is a possibility of double recovery without such a rule. Even with this rule of deduction, however, the possibility of overcompensation is alive. In essence, the promisee is able to receive tort damages, even though the underlying harm is a breach of contract. This result "throws off the delicate contract damage system" and makes it possible for a promisee to end up better off than he would have been if the promised performance had occurred.[270]

The discrepancy between the promisor's liability and the inducer's liability is troubling. Holding an inducer liable for more damages than the person who actually owed the duty under the contract is anomalous, to say the least.[271] Once the gendered injury is removed from the equation, it is difficult to argue that the inducer has done something "more wrong" than the breaching promisor; indeed, all the inducer has done is helped to bring about the breach. The issue of proportionality, or "making the punishment fit the crime" is askew: "the question is what is the relative culpability of actors who have different roles under the *same* set of facts. While views on 'fairness' may differ, it is difficult to conclude that an 'accessory' (the inducer) should be treated far more harshly than the 'principal' (the breaching promisor)."[272]

The better position is that damages for the tort of interfering with contractual relations should be limited to contractual damages. Although at first blush it seems odd to award anything other than tort damages for a tortious wrong, when it is remembered the actual wrong of this tort is a breach of the underlying contract, the limitation makes sense. Moreover, limiting damages to those recoverable in contract has many advantages. Holding both the promisor and the inducer to the same level of damages is fair. It honors the autonomy of the breaching party, accounts for her participation in the loss, and reflects the equivalent responsibility of both parties. It is consistent with the view that the inducer is liable as a form of mixed joint liability for the loss caused by the breach, as well as with general principles of contract law. Since the real wrong of this tort is the breach, the remedy available should be that which is generally applicable for breach of contract, according to the rules of contract law.

Already, case law shows some movement towards adopting this view. A minority of courts has long suggested that the appropriate measure of damages should be limited to those available when the contract was made.[273]

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the damages recoverable for breach of the contract are common to the actions against both, any payments made by the one who breaks the contract . . . must be credited in favor of the defendant who has caused the breach." RESTATEMENT (SECOND) OF TORTS § 774A cmt. e (1979).

[270] Dowling, *supra* note 248, at 509.

[271] PROSSER & KEETON ON TORTS, *supra* note 63, at 1004.

[272] Wexler, *supra* note 1, at 326.

[273] *See* PROSSER & KEETON, *supra* note 63, at 1003 & n.65 (citing McNutt Oil & Refining Co. v. D'Ascoli, 281 P.2d 966 (Ariz. 1955) (allowing punitive damages but limiting contractual damages to actual damages)); *see also, e.g.*, R & W Hat Shop, Inc. v.

Also, courts have applied the contract doctrine regarding liquidated damages to interference cases.[274] Often, if there is a liquidated damages clause in the contract, courts will hold that the amount set in the clause is the maximum recovery available, and no award can be made over that amount. Taken together, the application of liquidated damages rules and the case law already limiting damages to those available in contract indicate that there is a fluidity to the division between contract and tort damages in interference cases, a fluidity which could easily shift to a purely contractual damages system.[275]

There is much scholarly debate regarding whether expectancy damages offer full compensation for contractual breaches.[276] But if expectancy damages are viewed as fully compensatory in a two-party situation, "so that the promisee is indifferent between receiving performance or the value of performance, this should also remain true in the three-party inducement context."[277] And the same should still hold true even if expectancy damages are viewed as undercompensatory; it is difficult to find a persuasive argument that a promisee whose promisor breached without conferring with any other party first should be restricted to undercompensatory damages, whereas a promisee whose promisor breached after consultation with another party deserves a greater amount of compensation.

If expectancy damages are undercompensatory, it is still difficult to see why the interferor, who has done nothing more than participate in the underlying breach, should be solely responsible for paying more. Surely the interferor cannot be saddled with the failings of the contract law system. Chancellor Perlman states it well: "[t]o the extent that undercompensation interferes with the objectives of contract doctrine, a reform applicable to all breaches seems a more appropriate response."[278]

Sculley, 118 A. 55 (Conn. 1922) (limiting damages to actual damages); Swaney v. Crawley, 157 N.W. 910 (Minn. 1916) (damages limited to those for breach of contract); Mahoney v. Roberts, 110 S.W. 225 (Ark. 1908) (limiting damages to those available in contract); Armendariz v. Mora, 553 S.W.2d 400 (Tex. Civ. App. 1977) (damage awards for tortious interference same as those for breach of contract, but exemplary damages allowable when actual malice proven); Kerr v. Du Pree, 132 S.E. 393 (Ga. Ct. App. 1926) (stating damages are limited to amount that would have been earned under contract). Pennsylvania restricts damages available for interference to those available for breach of contract. *See, e.g.*, Fishkin v. Susquehanna Partners, 563 F. Supp. 2d 547 (E.D. Pa. 2007) (federal case interpreting Pennsylvania state law).

[274] Deepa Varadarajan, Note, *Tortious Interference and the Law of Contract: The Case for Specific Performance Revisited*, 111 YALE L.J. 735, 757 (2001).

[275] *Id.* at 757–59 (citing Wichita Clinic, P.A. v. Columbia/HCA Healthcare Corp., 45 F. Supp. 2d 1164 (D. Kan. 1999); Mem'l Gardens, Inc. v. Olympian Sales & Mgmt. Consultants, Inc., 690 P.2d 207 (Colo. 1984); McEnroe v. Morga, 678 P.2d 595 (Idaho Ct. App. 1984)).

[276] *See* Perlman, *supra* note 8, at 88–89.

[277] Note, *supra* note 274, at 747 (paraphrasing Perlman, *supra* note 8, at 93).

[278] Perlman, *supra* note 8, at 89.

Conclusion

The problematic nature of the tort of interference with contractual relations is widely acknowledged. However, previous attempts at explaining its anomalous nature have ignored the crucial role that gender played in the formation of the tort. The tort's structure mimics that of the erotic triangle, a cultural archetype in which two rivaling males compete for one woman. Its previous legal manifestations, consisting of enticement, seduction, and criminal conversation, provided the precedents for interference with contractual relations, and the particular factual matrix which came before the court in *Lumley v. Gye* ensured that the new tort appeared to be a natural extension.

In *Lumley v. Gye*, "gender was a catalyst" that transformed legal doctrine.[279] Because the tort was created under a particularly gendered circumstance involving male rivalry over the services of a woman, the tort privileged the two men as subjects, and denied the full autonomy of Johanna Wagner. It ignored her role in causing the breach, and placed responsibility for her actions not on her, but on the man who influenced her decision. The tort treated her as the property of the man with whom she had contracted and failed to recognize her right to control her own labor. It impeded her ability to seek out new, economically beneficial relationships for herself by imposing a risk on potential contractual partners that was meant to deter them. It configured her as a commodity in a marketplace of men.

The way in which the tort commodifies the contract breacher facilitated the use of the tort as a means of oppression during its subsequent development. The tort was used against former slaves in the southern United States, workers attempting to form labor unions, and employees seeking mobility. These examples demonstrate how the tort's structure is irreconcilable with modern social and legal values and should be reconfigured. The conception of the tort as a form of mixed joint liability, in which the interferor is responsible for his participation in the underlying breach as opposed to an independent wrong, and damages are limited to those available in contract, provides a viable alternative. This reconfiguration removes the property and causation problems inherent in the tort, and provides an assignment of blame that is not based on gendered assumptions about how men relate to each other.

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[279] VanderVelde, *Gendered Origins*, *supra* note 3, at 782.

HOME RULES

SARAH SWAN†

ABSTRACT

Thousands of American cities and towns are responding to social problems like bullying, drug abuse, and criminality by passing ordinances that hold individuals responsible for the wrongful acts of their family members and friends. Parental liability ordinances impose sanctions on parents when their children engage in bullying or other targeted behaviors; mandatory terms in rental housing leases require the eviction of tenants whose family members, friends, or guests engage in unlawful acts; and nuisance ordinances require evictions when a threshold number of calls to police is exceeded, even though such calls are often related to another person's wrongful or abusive behavior.

Cities typically rely on home rule authority to pass these ordinances, and these ordinances in turn create new "home rules" for the households affected. These new home rules are a form of third-party policing, and through them, the city is becoming an increasingly significant player in governing families and regulating intimate spaces. These home rules cut against the standard understanding of the home as mostly private and self-governed, and instead configure it as a site of state-required risk management and crime prevention. In so doing, these ordinances destabilize families and disrupt kinship structures, regardless of whether one is able to comply with them or not. Further, the ordinances allocate the burdens of preventing crime and managing risk in a manner inflected with gender, race, and class issues. Fortunately, the dynamism of localism can promise a better solution to the social problems that prompted these ordinances in the first place.

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INTRODUCTION

The ability to "establish a home and bring up children" is a fundamental part of the American dream.[1] Lately, however, residents in thousands of cities and towns across America are finding their

1. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

ability to do this undermined by a number of local ordinances.[2] These ordinances, passed in response to pressing social problems like bullying, criminality, and drug abuse, use strict or vicarious liability to hold parents and other heads of household legally responsible for the wrongful actions of their family members and friends.[3] For example, parental liability ordinances threaten parents with fines and other penalties if they do not prevent their children from bullying others, or if their children engage in other targeted behaviors.[4] Additionally, crime-free ordinances mandate that rental housing leases must include a "crime-free lease addendum," which sets out how tenants will be evicted if their friends or family members commit an unlawful act on or near the leased premises. Similarly, nuisance laws require a tenant's eviction from rental housing if a threshold number of calls to the police is exceeded, even if the basis for the calls is another person's wrongful or abusive behavior.

These laws can be understood as a form of third-party policing, an increasingly important form of regulation and law enforcement that is now often deployed to address social problems.[5] In third-party policing, the state requires private parties—who neither participate in nor benefit from the misconduct they are compelled to address—to enforce laws and prevent misconduct by enacting some method of control over a primary wrongdoer.[6] Failure to perform these assigned duties results in civil or criminal sanctions.[7]

The private parties typically called upon to perform these enforcement duties are businesses, professionals, and industrial actors, and the sites that they are asked to police are typically public.[8] However, fairly early in its development, third-party policing began targeting a more intimate arena. Through parental liability laws and the "one-strike" policy for residents of federal public housing projects, tenants and parents were required to police their homes.

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2. *See infra* text accompanying notes 93–101 and 116–18.

3. Although "head of household" has a technical meaning as a filing status for individual income tax purposes, it is used here in a more generic sense, as a broad term that encompasses any adult, tenant of record, or parental figure who performs the role of taking care of a home and the people in it.

4. See *infra* notes 100–09 and accompanying text.

5. LORRAINE MAZEROLLE & JANET RANSLEY, THIRD PARTY POLICING 45–46 (2005).

6. REINIER H. KRAAKMAN, *Gatekeepers: The Anatomy of a Third-party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986).

7. MAZEROLLE & RANSLEY, *supra* note 5, at 7.

8. Janet A. Gilboy, *Compelled Third-Party Participation in the Regulatory Process: Legal Duties, Culture, and Noncompliance*, 20 LAW & POL'Y 135, 135 (1998).

Both parental liability laws and the one-strike policy became popular in the late 1980s, the former in response to a perceived increased in juvenile crime and disorder, and the latter in response to extremely high crime rates in federal public housing projects.[9] Under parental liability laws, parents were held legally responsible for the wrongful actions of their children. Under the one-strike policy, residents of federal public housing could be evicted if anyone associated with their household engaged in any criminal or drug-related behavior on the premises.[10]

Initially, significant bodies of scholarship grew up around both the parental liability laws and the one-strike policy.[11] However, this scholarship tended to treat each as isolated phenomena and focused on parental liability laws at the state level, and the one-strike policy at the federal one. But, "in the shadow of the debate" about these policies, "*local* governments nationwide have quietly implemented

9. JOEL SAMAHA, CRIMINAL LAW 229 (10th ed. 2010). Although the number of juveniles arrested for violent crime actually decreased in the period between 1978 and 1987, the number of those arrests that were for rape and aggravated assault went up. Kathryn J. Parsley, *Constitutional Limitations on State Power to Hold Parents Criminally Liable for the Delinquent Acts of Their Children*, 44 VAND. L. REV. 441, 444 (1991). Further, the following year there was a drastic overall increase in juvenile arrests for violent crimes. *Id.*

10. For a discussion of the background and development of the one-strike policy, see generally Caroline Castle, Note, *You Call That a Strike? A Post-*Rucker *Examination of Eviction from Public Housing Due to Drug-Related Criminal Activity of a Third Party*, 37 GA. L. REV. 1435 (2003). Notably, in 2010, 86 percent of the evictions in federal housing projects in Chicago under the one-strike policy were for third-party activity. Laura Peterson, *Collective Sanctions: Learning from the NFL's Justifiable Use of Group Punishment*, 14 TEX. REV. ENT. & SPORTS L. 165, 165 (2013).

11. Examples of scholarship focused on the federal one-strike policy include Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273, 275 (2002); Christopher Mele, *The Civil Threat of Eviction and the Regulation and Control of U.S. Public Housing Communities*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES 121, 130 (Christopher Mele & Teresa Miller eds., 2005); Bryan Cho, Note, *Getting Evicted for the Actions of Others: A Proposed Amendment to the Anti-Drug Abuse Act*, 44 B.C. L. REV. 1229, 1234–35 (2003); Margaret E. Finzen, Note, *Systems of Oppression: The Collateral Consequences of Incarceration and Their Effects on Black Communities*, 12 GEO. J. ON POVERTY L. & POL'Y 299, 313–14 (2005); and Lisa Weil, Note, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 171 (1991). Examples of scholarship focused on parental liability include Valerie D. Barton, Comment, *Reconciling the Burden: Parental Liability for the Tortious Acts of Minors*, 51 EMORY L.J. 877, 879 (2002); Jerry E. Tyler & Thomas W. Segady, *Parental Liability Laws: Rationale, Theory, and Effectiveness*, 37 SOC. SCI. J. 79, 81–82 (2000); Jason Emilios Dimitris, Comment, *Parental Responsibility Statutes—And the Programs That Must Accompany Them*, 27 STETSON L. REV. 655, 662 (1997). This literature generally focuses on parental liability laws at the state level, and has not yet focused on how they combine with other laws to target the home at the local level.

programs that apply the same 'one strike' logic."[12] Crime-free lease addendums and chronic-nuisance-abatement ordinances use the same form of vicarious liability as the one-strike policy, and local law has now brought that vicarious liability to bear on a much larger portion of the population.[13] An estimated 100 million people occupy 38.6 million rental properties in America, and given that crime-free lease addendums and nuisance ordinances are currently present in nearly 2000 cities and towns across the nation, many of these households are now subject to eviction based on the wrongdoing of others.[14] Parental liability ordinances are expanding, too, both in terms of the scope of behaviors they encompass, and the increasing number of cities enacting them.[15]

Despite their burgeoning numbers, the crime-free lease addendums, nuisance ordinances, and expanding parental liability ordinances have flown mostly under the radar of legal scholarship.[16] There are two reasons for this. First, the origin of these rules in local law has allowed them to proliferate mostly unnoticed. With the exception of a small group of prominent local-law scholars, the legal academy generally tends to overlook local law.[17] And, as a practical point, the breadth and variances between jurisdictions make it a difficult area to empirically or sometimes even qualitatively study.[18]

The second reason that these ordinances have proliferated relatively unremarked is that third-party policing itself is "generally

12. Scott Duffield Levy, Note, *The Collateral Consequences of Seeking Order Through Disorder: New York's Narcotics Eviction Program*, 43 HARV. C.R.-C.L. L. REV. 539, 540 (2008) (emphasis added).

13. *Id.*

14. Janet Hawkins, *Landlord Accountability and Crime Prevention*, 63 CRIME PREVENTION 66, 66 (2011).

15. Jennifer M. Collins, Ethan J. Leib & Dan Markel, *Punishing Family Status*, 88 B.U. L. REV. 1327, 1340 (2008).

16. *But see generally* Mishran Wroe, *Preemption of Municipal Crime-Free Housing Ordinances*, 2 TENN. J. RACE, GENDER & SOC. JUST. 123 (2014) (arguing that the Fair Housing Act preempts crime-free ordinances); Nicole Livanos, *Crime-Free Housing Ordinances: One Call Away From Eviction*, 19 PUB. INT. L. REP. 106 (2014) (discussing the impact of crime-free ordinances on victims of crime).

17. For instance, Professor Ethan Leib notes that "legal scholars have almost universally ignored the law in local courts, favoring the study of federal courts and state appellate courts." Ethan J. Leib, *Localist Statutory Interpretation*, 161 U. PA. L. REV. 897, 898–99 (2013).

18. Fortunately, new online databases like Municode are opening up research possibilities in local law. *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1125 (2012).

invisible."[19] Because it appears in many different contexts, and sometimes merely repurposes old laws that were originally enacted for other reasons, third-party policing has only just begun to attract the scholarly attention of a few pioneering academics.[20] Third-party policing practices are ubiquitous, but its emergence as an "articulated or developed doctrine" is still in its infancy, and while the literature is growing, there has not yet been widespread examination of third-party policing activities and practices.[21]

This Article offers an examination and excavation of the nationwide trend of cities and towns enacting ordinances that use vicarious liability to hold household and family members responsible for the actions of others. These laws can be understood as "home rule ordinances," a term that highlights three important features shared by these ordinances. First, home rule ordinances create a new standard of home governance that parents and heads of household must meet to avoid legal sanction. In other words, the ordinances create a set of "home rules" that apply to the internal workings of home life. Second, they establish rules about who gets to have a home at all; that is, they serve as a sorting rule, setting parameters for home-worthiness in a broader sense. The ability to keep one's home becomes contingent on one's ability to control the behavior of another person, and if a tenant fails to demonstrate such control, eviction can follow.[22] And, finally, the ordinances are home rule ordinances in another, more literal sense: they typically rely on a city's home rule authority for their existence.[23] Home rule ordinances

19. MAZEROLLE & RANSLEY, *supra* note 5, at 50.

20. Such academics include Michael Buerger, Reinier Kraakman, Lorraine Mazerolle, and Janet Ransley. Other scholars have used different terminology to describe the same or similar phenomena, such as "plural policing" or "third-party liability systems." See, for example, Ian Loader, *Plural Policing and Democratic Governance*, 9 SOC. & LEG. STUD. 323, 324 (2000) (plural policing) and Gilboy, *supra* note 8, at 135 (third-party liability systems).

21. MAZEROLLE & RANSLEY, *supra* note 5, at 50.

22. For low-income tenants, evictions often result in homelessness. *See infra* text accompanying notes 271–98. The use of home rule ordinances as a mechanism for displacing people has important implications for housing discrimination. As Desmond and others write, "Our efforts to monitor and reduce housing discrimination have been almost entirely concentrated on *getting in*; we have overlooked, meanwhile, the process of *getting (put) out*." Matthew Desmond, Weihua An, Richelle Winkler & Thomas Ferriss, *Evicting Children*, 92 SOC. FORCES 303, 304 (2013).

23. Home rule can be understood as a method by which state governments can transfer power to local governments, thereby allowing local governments "autonomy in the management of their local affairs." James D. Cole, *Constitutional Home Rule in New York: 'The Ghost of Home Rule,'* 59 ST. JOHN'S L. REV. 713, 713 n.1 (1985).

are passed as part of a city's power to regulate its own local or municipal affairs, and have faced challenges on the basis that they exceed the grant of home rule authority.[24]

This Article argues that although these home rule ordinances seem to hold some initial appeal, they are deeply problematic. They place an undue burden on familial and intimate relationships, undermine our legal, cultural, and aspirational notions of home, and represent an attempt by municipalities to regulate highly intimate spaces and alter people's home lives. Through these ordinances, cities coerce friends and family members into serving as "'intimate handler[s],'" and into becoming part of "networks of security production."[25] This "networked governance" governs both the watchers and the watched,[26] and has important implications for privacy, for parenting rights, for who can establish a home, and for how people must parent.

This Article proceeds as follows. Part I situates home rule ordinances in the context of third-party policing, and describes how a series of shifts in governance created a political landscape in which third-party policing measures could flourish. Part II describes how home rule ordinances establish the home as a site of risk management, crime prevention, and security production, compelling parents and heads of household to engage in a variety of surveillance and compliance behaviors. Part III explores the role of vicarious liability, fault, and vulnerability in home rule ordinances. Next, Part IV considers the consequences of noncompliance with home rule ordinances, including stigma, fines, and eviction. Part V first considers the current legal avenues for challenging home rule ordinances. Part V then argues that cities should consider moving away from home rule ordinances, and offers some alternative interventions that cities could employ to address the broader, structural issues often underlying problems involving misconduct, criminality, and drug use.

The Article concludes by suggesting that home rule ordinances are transforming the "*right* to maintain control" over one's home into a *duty* to control all the people connected to that home, and deter

24. *See infra* note 335.

25. Marcus Felson, *Routine Activities and Crime Prevention in the Developing Metropolis*, 25 CRIMINOLOGY 911, 912 (1987); Jennifer Wood, *Networked Policing for the Future* 1 (June 1, 2005), http://www.researchgate.net/publication/265303410_Networked_Policing_for_the_Future.

26. Wood, *supra* note 25.

them from engaging in wrongful conduct.[27] Such a duty is likely impossible to fulfill, and the attempt to comply with it can fracture familial and social bonds in ways that actually contribute to, rather than prevent, the social problems that initially prompted these ordinances.

I. THIRD-PARTY POLICING AS A RESPONSE TO SOCIAL PROBLEMS

This Part describes how third-party policing came to be a popular response to many social issues. Part I.A chronicles the growth of third-party policing out of a series of shifts in governance. With the late modern state's shift from sovereignty to governmentality, and from welfarism to neoliberalism, crime has emerged as a new paradigm for governance. The criminal paradigm is now applied in a variety of contexts, including the context of social issues that used to lie outside of its purview. Crime fighting also encompasses a variety of new tools. One of these new tools is a focus on the potential of third parties to control crime. Home rule ordinances are part of this trend.

Part I.B offers a more detailed sketch of each of the three types of ordinances that comprise the new home rules: parental liability ordinances, crime-free lease ordinances, and nuisance ordinances. These ordinances use strict vicarious liability to hold a parent or head of household responsible for the wrongful actions of another household member.

A. The Rise of Third-Party Policing

In modern Western societies, legal norms have traditionally been enforced through direct deterrence.[28] Lately, though, in their struggle to address complex social problems, governments at all levels are turning to third-party policing.[29] Third-party policing tries to deter unlawful conduct by coercing a third party into performing activities that will discourage a potential primary wrongdoer.[30] To motivate private parties to perform these policing duties upon primary

27. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993); *see* Javinsky-Wenzek v. City of St. Louis Park, 829 F. Supp. 2d 787, 797 (D. Minn. 2011) (quoting *James Daniel Good Real Prop.*, 510 U.S. at 53).

28. Kraakman, *supra* note 6, at 56; *see* Bartnicki v. Vopper, 532 U.S. 514, 516 (2001) ("The normal method of deterring unlawful conduct is to punish the person engaging in it.").

29. MAZEROLLE & RANSLEY, supra note 5, at 2–3.

30. *Id.*

wrongdoers, third-party policing relies on a number of "legal levers": regulatory, civil, or criminal sanctions that befall those who fail to police properly.[31]

Third-party policing is now used to solve myriad "pressing social problems," at local, national, and international levels.[32] For instance, if juvenile vandalism or destruction of property is a problem in a particular community, that community may try to hold the parents liable for the costs of that damage.[33] Similarly, if sweatshop factories are an issue for a particular nation, that nation may hold manufacturers liable for their subcontractors' violations of federal laws, and may also co-opt retailers into the policing project to decrease the end market for these products.[34] The key is that a third party, thought to have some means of controlling the actions of a targeted party, is compelled by the threat of legal sanction to perform policing activities that could accomplish this goal.

The growing popularity of third-party policing as a solution to social problems can be traced to three shifts in modern governance.[35] First, there is a "movement from sovereignty to governmentality."[36] Under sovereignty, the state used "force and domination" to maintain its power both on the international stage and within its own borders.[37] Under governmentality, however, the state uses a different set of tools. Instead of force and domination, governmentality relies on subtler "technologies of governance."[38] These tools are "more diffuse and spread over institutions both of the state and civil society" and result in "individuals governing themselves" and one another.[39]

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31. *Id.*

32. Gilboy, *supra* note 8, at 140.

33. *Id.*

34. *Id.*

35. MAZEROLLE & RANSLEY, *supra* note 5, at 5.

36. *Id.* at 7 (citing MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (1st ed. 1977)).

37. *Id.*

38. *Id.*

39. *Id.* at 13; *see* James Hay, *Unaided Virtues: The (Neo)Liberalization of the Domestic Sphere and the New Architecture of Community*, *in* MICHEL FOUCAULT, CULTURAL STUDIES, AND GOVERNMENTALITY 165, 166 (Jack Z. Bratich, Jeremy Packer & Cameron McCarthy eds., 2003) (discussing how the government "came to rely less upon political institutions . . . and to develop techniques for governing at a distance" by using practices that individuals "in their freedom can use in dealing with each other"); Ronen Shamir, *The Age of Responsibilization: On Market-Embedded Morality*, 37 ECON. & SOC'Y 1, 8 (2008) ("[R]esponsibilization operates at the level of individual actors . . . to mobilize designated actors actively to undertake and perform self-governing tasks.").

The configuration of individuals as "responsible for their own governance" is also part of a second political shift, from "welfarism to neoliberalism."[40] Under neoliberalism, individuals are not controlled or policed in the traditional sense. Instead, they are recruited into policing and regulating themselves and others.[41] These duties are justified not only on the grounds of ability—that is, the idea that members of the community *could* and therefore *should* prevent crime—but also on the grounds of *responsibility*.[42] "'[T]he community'" becomes "'the all-purpose solution'" to every social issue, not only because community members can help prevent crime and related problems, "but also because some were found to be *responsible* for it."[43]

Professor David Garland's theory of "responsibilization" helps explain how this works.[44] He notes that in managing populations, governments now tend to act not directly, through their own state agencies, but instead indirectly, through nonstate actors.[45] As he puts it, the current "primary concern" of government is "to devolve responsibility for crime prevention on to agencies, organizations and individuals which are quite outside the state and to persuade them to act appropriately."[46] Ultimately, the state "is seeking to implement 'social' and 'situational' forms of crime prevention which involve the re-ordering of the conduct of everyday life right across the social field," including the home.[47] Whereas the state's initial target for

40. MAZEROLLE & RANSLEY, *supra* note 5, at 23. The authors describe how between World War II and the 1960s, "the dominant Western framework was a Keynesian one, where the welfarist state operated through the government to control and regulate the economy, society and the provision of services to the community. In this conception of the state, government is everything and all social, economic, regulatory and political action occurs within its framework." *Id.* at 8.

41. Mele, *supra* note 11, at 130. Also, "[a]t the urban level, neoliberalism has important implications for the spatial development and governance of cities, which in turn affect patterns of crime, governance of police departments, and policing strategies and priorities." Jeremy Kaplan-Lyman, Note, *A Punitive Bind: Policing, Poverty, and Neoliberalism in New York City*, 15 YALE HUM. RTS. & DEV. L.J. 177, 180 (2012); *see* Ian Loader, *Plural Policing and Democratic Governance*, 9 SOC. & LEGAL STUD. 323, 324 (2000) ("We inhabit a world of plural, networked policing.").

42. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 119 (2013).

43. *Id.* (emphasis added).

44. David Garland, *The Limits of the Sovereign State: Strategies of Crime Control in Contemporary Society*, 36 BRIT. J. CRIMINOLOGY 445, 452 (1996).

45. *Id.*

46. *Id.*

47. *Id*. at 454.

transformative action was the individual wrongdoer, it now seeks to alter "the norms, the routines, and the consciousness of everyone," in order to make crime prevention a part of everyone's quotidian culture and practice.[48]

Indeed, a third shift in modern governance is that crime itself has become a mode of governance in America.[49] Beginning in the 1960s, the United States has increasingly engaged in "governing through crime."[50] The tools of criminal law, like "criminalization, incarceration, [and] police intervention," are brought in as the answer to nearly every social problem, even those once considered well beyond the reach of criminal law.[51] Crime control has infiltrated areas and zones of personal lives that were once believed to be largely outside its scope, and has become "the funnel through which all other policy interventions flow."[52] It is now "the central metaphor through which government intervention and coercion is justified" and rationalized.[53]

In addition to the ever-expanding scope of criminal law, the kinds of interventions and coercive tools used in the name of fighting crime have become more diverse over time. For instance, civil remedies are now also often used in service of crime control. In the 1980s, problem-oriented policing started using civil ordinances to accomplish its goals, a practice that has continued to grow.[54] Civil ordinances provide the criminal law with an even greater sphere of impact and are able to access areas of private life that were once unavailable to it.[55] The National Institute of Justice, for instance, suggests that "one of the most important advantages of using civil remedies" is their ability to reach "beyond the scope of the criminal law" and control behavior that the criminal law could not access.[56]

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48. *Id.*

49. *See generally* JONATHON SIMON, GOVERNING THROUGH CRIME (2009) (asserting that since the 1960s, communities have slowly become governed through crime).

50. *Id.* at 1.

51. Levy, *supra* note 12, at 539. The school-to-prison pipeline is a good example of the expanding reach of the criminal law. *School-to-Prison Pipeline*, AM. CIVIL LIBERTIES UNION, https://www.aclu.org/school-prison-pipeline (last visited Jan. 16, 2015).

52. Levy, *supra* note 12, at 577; *see also* Kaplan-Lyman, *supra* note 41, at 180.

53. Kaplan-Lyman, *supra* note 41, at 188.

54. Michael E. Buerger, *The Politics of Third-Party Policing*, 9 CRIME PREVENTION STUD. 89, 91 (1998).

55. For a description of this expansion of criminal law, see generally SIMON, *supra* note 49.

56. Levy, *supra* note 12, at 577.

Many of the civil ordinances that are used in service of the criminal law concern land. In fact, crime management has recently turned away from traditional enforcement methods and toward "land management responses."[57] One legal scholar suggests that this shift is the result of "[t]he Warren Court's 'criminal procedure revolution,'" which placed constitutional limits on how police could impose social order.[58] Land-management solutions like "stricter housing codes, trespass zoning, and homeless campuses," which avoid such procedural and constitutional complications, thereby became an attractive option for policymakers.[59] Accordingly, the application of civil-law tools like "nuisance abatement, forfeiture, and eviction" to problems originally approached through the criminal law has been dramatically increasing.[60]

The shifts from sovereignty to governmentality, from welfarism to neoliberalism, and from traditional law-enforcement techniques to land-management tools have generated third-party policing as an important new technology of governance, one that is frequently relied upon as part of the state's crime-fighting apparatus.[61] Indeed, "the extensive use of third parties" has become "[o]ne of the most striking features of contemporary social regulation."[62] Many of these third-party policing schemes compel multiple third parties to perform policing duties.

As the new focus on land-management responses suggests, third-party policing often involves monitoring and obtaining control over a specific geographical site.[63] A common example of this form of third-party policing involves taverns or bars. Usually, after discovering a problem associated with a particular drinking establishment, such as drunk and disorderly patrons, the police will ask the third party to perform some activity that is not normally part of its business

57. *Id.* at 548 n.61 (citing Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1078 (2005)). Examples of land-management responses include "stricter housing codes, trespass zoning, and homeless campuses." *Id.*

58. Garnett, *supra* note 57, at 1082.

59. Levy, *supra* note 12, at 548 n.61 (citing Garnett, *supra* note 57, at 1082).

60. *Id.* at 549.

61. Desmond & Valdez, *supra* note 42, at 117–18.

62. Gilboy, *supra* note 8, at 137. Historically, policing was actually an activity performed by citizens, as "[e]very man had a responsibility to secure his own neighborhood through the obligation to join in the 'hue and cry' and to keep in his house a stash of arms for the specific purpose of maintaining the peace." Julie Ayling & Peter Grabosky, *Policing by Command: Enhancing Law Enforcement Capacity Through Coercion*, 28 LAW & POL'Y 420, 421 (2006).

63. MAZEROLLE & RANSLEY, *supra* note 5, at 84.

practices.[64] This action can be a change to the physical environment, like constructing a barrier, adding lighting, or installing more access controls, or it can be a change to business behaviors, like adopting screening protocols for tenants or implementing rules of conduct for patrons.[65] If the third party accedes to the request, all is well.[66] If not, a "legal lever" will be deployed to coerce compliance.[67] For instance, bar owners who fail to make the requested change may "find themselves the subject of an unscheduled health or building code inspection, or other regulatory action."[68]

Another popular legal lever is the extension of liability from the primary wrongdoer to the secondary wrongdoer—a "gatekeeper" or "enabler"—who has the ability to "disrupt the wrongdoing" by either withholding services or performing some other preventive measure.[69] A common example of gatekeeping liability occurs when lawyers or accountants are held liable for the fraudulent security transactions of their clients.[70]

Although there is not yet much hard data studying the effectiveness of third-party policing,[71] these schemes have been rapidly replicating and reproducing themselves.[72] This is a common occurrence in lawmaking:

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64. Michael Buerger, *Third-Party Policing: Futures and Evolutions*, *in* POLICING 2020: EXPLORING THE FUTURE OF CRIME, COMMUNITIES, AND POLICING 452, 454 (Joseph A. Schafer ed., 2007).

65. *Id*.

66. *Id*. at 454–56.

67. *Id*.

68. *Id.* at 455.

69. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 365 (2003).

70. *Id*. The police or state actors have only a minor role in this version of third-party policing, generally consisting of "educating third parties about their potential liability or ways to reduce it." MAZEROLLE & RANSLEY, *supra* note 5, at 95.

71. Mazerolle and Ransley note that "very little discourse surrounds third party policing activities and there exists very little systematic assessment of third party policing practices." *Id.* at 50. Similarly, Professor Greg Koehle states that "very little research has been conducted on third party policing programs, and even less on the party expected to fulfill the third party policing role." Greg Koehle, *Controlling Crime and Disorder in Rental Properties: The Perspective of the Rental Property Manager*, 14 W. CRIMINOLOGY REV. 53, 54 (2013).

72. For a detailed account of the increasing prevalence of third-party policing, see generally MAZEROLLE & RANSLEY, *supra* note 5. As another example, the city of Escondido, California, enacted an ordinance entitled "Establishing Penalties for the Harboring of Illegal Aliens in the City of Escondido." Under this ordinance, landlords who "let, lease[d], or rent[ed] a dwelling unit to an illegal alien, knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law" would face civil and criminal sanctions. *See* Garrett v. City of Escondido, 465 F. Supp. 2d 1043, 1048 (2006).

> Political scientists have noted the interesting phenomenon in legislative activity that over time certain notions or ways of dealing with problems become prominent (perhaps in part because of perceptions of their past success in solving problems) and these solutions come to be attached by decision makers to a wide range of problems as they come to their attention.[73]

Cities have been particularly keen on turning to third-party policing as a solution to social problems.[74] Perhaps surprisingly, in an era of globalization and the simultaneous rise of both nation-states and supranational governing bodies, the role of local governments and municipalities has not been diminished.[75] On the contrary, there is a growing "dialectical relationship" between local governments and these larger bodies of governance, such that local governments have managed to "not only persist in the age of 'globalization' but to actually acquire importance and new . . . powers."[76]

Local governments, seeking to address social issues like bullying, drug abuse, and other criminal or undesirable behaviors, are increasingly turning to third-party policing as the answer. Continuing the new tradition of characterizing social problems as criminal issues, cities and municipalities across the nation are increasingly enacting ordinances that piggyback onto criminal behaviors and require third parties to monitor and control the behavior of others.

In particular, cities are increasingly pushing third-party policing into the home and using it as a tool to govern households.[77] Initially,

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73. Gilboy, *supra* note 8, at 139.

74. Professor Jeffrey Parness states that cities have also been using third-party policing for more mundane purposes, like municipal automated-traffic-enforcement schemes. Under this form of enforcement, cameras capture driving infractions and the city issues tickets to vehicle owners, regardless of who was driving at the time of the infraction. This results in a "form of strict liability for secondary culprits,' those owning the vehicles." Jeffrey A. Parness, *Beyond Red Light Enforcement Against the Guilty But Innocent: Local Regulations of Secondary Culprits*, 47 WILLAMETTE L. REV. 259, 259 (2011). The justification for this imposition is that the "secondary culprits" have some "ability to control the 'primary culprits,' those using the vehicles," and should use that ability to ensure adherence to the rules of the road. *Id.* This system of regulation mimics the principal's liability doctrine found in tort law.

75. Mariana Valverde, *Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance*, 45 LAW & SOC'Y REV. 277, 307 (2011).

76. *Id.* at 307–08 (noting that this is "in part because of their ability to serve new functions and become a tool of global rather than local capital").

77. Perhaps surprisingly, the very idea of policing has deep historical and etymological connections to both households and third parties. For much of "Western political history," "police" referred not to uniformed individuals who drive squad cars and arrest people, but instead to "the hierarchical mode of governance in which the polis is treated as a household rather than a gathering of autonomous equals." Alec C. Ewald, *Collateral Consequences*, *in*

in the middle of the last century, municipalities tried to police social disorder by focusing on outside spaces, through ordinances such as vagrancy and loitering laws.[78] However, in the 1960s courts began striking down these laws,[79] so cities began refocusing the attention from external to internal spaces, and "reached into a sector previously untouched by vagrancy laws: the home."[80] Cities "were able to do so, in part, because the recent criminalization of domestic violence allowed—indeed, required—the expansion of criminal law into private space."[81] Once the home had been opened up to legal intervention in this way, other criminal and civil laws entered the home, a space the legal system had begun to envision as not solely private, but instead "'in need of public control, like the streets.'"[82] Cities began to focus on curing disorder inside the home, and intervening in that formerly private space, in order to promote the broader goal of order and security in the city.

B. The Home Rule Ordinances

Home rule ordinances have emerged from this overall landscape. They follow this tradition of envisioning homes "'as in need of public control'" in order to promote the interests of reducing crime and increasing security.[83] The ordinances are designed with "the self-conscious purpose of leveraging familial solidarity" to both directly

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LAW AS PUNISHMENT / LAW AS REGULATION 77–123, 105 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2011) (citing Markus D. Dubber, *Regulatory and Legal Aspects of Penalty*, *in* LAW AS PUNISHMENT / LAW AS REGULATION, *supra*, at 19, 19–49 (Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey eds., 2011)). Further, prior to the establishment of modern police forces, "'policing' itself was a third-party obligation, imposed or offered to citizens." Buerger, *supra* note 64, at 458.

78. *See* Desmond & Valdez, *supra* note 42, at 120.

79. *See, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (placing constitutional limitations on loitering statutes); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (striking down a vagrancy ordinance); Parker v. Mun. Judge, 427 P.2d 642, 643–44 (Nev. 1967) (holding the ordinance unconstitutional because it punished the status of poverty).

80. Desmond & Valdez, *supra* note 42, at 120 (quotation mark omitted).

81. *Id.* (citing Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006)). It should be noted, however, that the focus on homes is in addition to, not instead of, the focus on public spaces. Cities continue to engage in "urban social control" through regulating public spaces, through now they often rely on new legal mechanisms to do so. *See* Katherine Beckett & Steve Herbert, *Dealing with Disorder: Social Control in the Post-Industrial City*, 12 THEORETICAL CRIMINOLOGY 5, 6 (2008).

82. Desmond & Valdez, *supra* note 42, at 120 (quoting JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 11 (2009)).

83. *Id.*

and indirectly deter potential wrongdoers.[84] The possibility of a negative impact on friends and family members is meant to *directly* dissuade potential wrongdoers from engaging in unlawful behaviors. At the same time, the ordinances are also meant to *indirectly* deter wrongdoing, by eliciting a series of behaviors from those friends and family members that will ward against criminal activity.[85] Family members and friends are thereby implicated "in the responsibility and liability for the management" of the risk of wrongdoing.[86] The three ordinances discussed below—parental liability ordinances, crime-free lease ordinances, and nuisance ordinances—attempt to achieve the goal of public security by controlling "not just individual behaviors," but also "broader social arrangements—where and how people live."[87]

1. *Parental Liability Ordinances.* Desperate to stop youth bullying and the suicides connected to it, many cities are now passing or considering passing ordinances that hold parents responsible for their children's bullying or other wrongdoing.[88] Bullying and

84. Levinson, *supra* note 69, at 413.

85. *Id.* (discussing the federal Anti-Drug Abuse Act of 1988, which was "designed to conscript family members to police and prevent their relatives' criminal behavior").

86. Mele, *supra* note 11, at 130.

87. Levy, *supra* note 12, at 540.

88. At the time of this writing, the cities that have passed ordinances holding parents vicariously liable for their children's bullying behavior include Monona, Wisconsin (population 7715, a suburb of Madison); Detroit, Michigan (population 701,475); Village of Mount Horeb, Wisconsin (population 7294) (using the same language as the Monona ordinance); and Kansas City, Missouri (population 464,310). *See* DETROIT, MICH., CODE OF ORDINANCES § 33-3-44 (2011); KANSAS CITY, MO., CODE OF ORDINANCES § 50-244 (2013); MONONA, WIS., CODE OF ORDINANCES § 11-2-17 (2013); MOUNT HOREB, WIS., CODE OF ORDINANCES 2013-14 (2013). Population numbers are taken from CITY DATA, http://www.city-data.com (last visited Jan. 17, 2015).

Carson City, California (population 93,000), voted on but ultimately rejected such an ordinance. Part of the opposition to the bill was based on the idea that it could be used in a racially discriminatory manner, to "further criminalize Black and Brown youth." Charlene Muhammad, *Punishing Bullies or Targeting Black Youth?*, FINAL CALL (May 22, 2014, 9:19 AM), http://www.finalcall.com/artman/publish/National_News_2/article_101450.shtml. The ordinance called for a one-hundred-dollar fine for the first violation, two hundred dollars for the second, and "a fine and counseling for the entire family" following a third violation. *Id.* The law also provided that "[a]nyone between 18-25 who participates in or encourages bullying or cyberbullying would also face misdemeanor charges." *Id.* Benton Harbor, Michigan (population 10,040), also considered a bullying ordinance that would hold parents liable for their children's bullying. First offences would require community service, and subsequent offenses would attract fines of seventy-four to five hundred dollars. That proposal is currently tabled. Barbara Harrington, *Proposed Anti-Bullying Ordinance Carries Strict Punishments*, WNDU.COM (Dec.

"bullycides" are now a major social issue across the nation and frequently dominate news headlines.[89] A recent *Psychology Today* article describes the coverage and scope of the problem: "It's relentless. Virtually every week the media informs us about another new tragedy of a young person taking his or her own life because they could no longer tolerate being bullied."[90] Bullying is understood in the popular imagination to be an extremely common and extremely dangerous social problem among kids and teens. The American Medical Association states that 3.2 million children have been bullied, and other studies suggest that 42 percent of children have experienced online bullying.[91] Celebrities and not-for-profit organizations have launched a number of campaigns to combat the

18, 2013, 11:50 PM), http://www.wndu.com/home/headlines/Proposed-anti-bullying-ordinance-carries-strict-punishments--236489351.html.

Milton, Wisconsin (population 5549), has a bullying ordinance that holds only the child, not the parent accountable. *See* Eric Schulzke, *Could Bullying and Harassment Become a Criminal Offense?*, DESERT NEWS NAT'L (May 22, 2014), http://national.deseretnews.com/article/1526/Could-bullying-and-harassment-become-a-criminal-offense.html. Marshfield, Massachusetts (population 24,324), and Dexter, Missouri (population 7864), have similar ordinances. *See* Jonathon Dawe, *Ballot Issue Won't Change Procedure for DPD*, DAILY STATESMAN (Aug. 1, 2014), http://www.dailystatesman.com/story/2105774.html; Raymond Neupert, *Marshfield Passes Cyber Bullying Ordinance*, WDEZ (Apr. 18, 2011, 3:00 AM), http://wdez.com/news/articles/2011/apr/18/marshfield-passes-cyber-bullying-ordinance. A nonparental bullying ordinance was also considered in East Greenwich, Rhode Island (population 13,146). *See* Barbara Polichetti, *East Greenwich, RI Considers Anti-Bullying Ordinance*, E. GREENWICH F.A.C.E.S. (Jan. 27, 2011, 10:50 PM), http://www.eastgreenwichfaces.org/apps/blog/show/5966854-east-greenwich-ri-considers-anti-bullying-ordinance.

89. For examples of these headlines, see Jeff Coltin, *Strike a Chord: Does Bullying Cause Suicide?*, WFUV.ORG (Nov. 6, 2014, 6:00 AM), http://www.wfuv.org/news/news-politics/141106/strike-chord-does-bullying-cause-suicide; Corinne Lestch, *Distraught South Carolina Mom Says Bullying Drove Son To Commit Suicide*, N.Y. DAILY NEWS (Nov. 21, 2014, 4:38 PM), http://www.nydailynews.com/news/national/south-carolina-mom-bullying-drove-son-commit-suicide-article-1.2019446; Chris Minor, *Local Parents Combat "Suicide by Bullying" After 12-Year-Old Daughter's Death*, WQAD8 (Nov. 6, 2014, 10:00 PM), http://wqad.com/2014/11/06/local-parents-combat-suicide-by-bullying-after-12-year-old-daughters-death. The term "bullycide" was coined in NEIL MARR & TIM FIELD, BULLYCIDE: DEATH AT PLAYTIME 1 (2001). It is a controversial term, as it seems to ignore the intervening act of the victim's suicide, instead attributing that act to the bully's wrongdoing. *Bullycide*, STOP BULLYCIDE NOW (May 16, 2014), http://stopbullycidenow.weebly.com/observation-blog-entry/bullycide.

90. Izzy Kalman, *Why Are So Many Kids Committing Bullycide?*, PSYCHOL. TODAY (Jan. 11, 2012), http://www.psychologytoday.com/blog/psychological-solution-bullying/201201/why-are-so-many-kids-committing-bullycide.

91. Kathy Quinn, *KCMO Council Passes Anti-Bullying Ordinance That Fines Parents for Kids' Bullying*, FOX4KC.COM (Aug. 15, 2013, 8:35 AM), http://fox4kc.com/2013/08/15/kcmo-council-considers-anti-bullying-ordinance-that-fines-parents-for-kids-bullying.

problem, and the law continues to explore the role and responsibilities of schools and parents in combatting bullying.[92]

At the state level, many legislatures are exploring the potential of parental liability statutes to address the problem. For instance, following the bullying-related suicide of twelve-year-old Rebecca Sedwick, some Florida lobbyists are attempting to craft legislation that would hold parents criminally liable for their children's bullying behavior.[93] Also, in Iowa, a bill imposing parental liability for bullying behavior was drafted and proposed.[94] The rationale underlying these proposed state laws is that poor parenting causes juvenile misconduct.[95] Proponents of these laws believe that "parents will spend more time and effort in monitoring the activities of their children if they know they will be held responsible for their children's actions," and that this monitoring will be an effective deterrent to bullying.[96]

Not content to wait for the sometimes laborious political process to work itself out at the state level, however, cities have forged ahead

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92. For example, activists Dan Savage and Terry Miller started the It Gets Better Project (www.itgetsbetter.org), a web-based campaign focused on helping gay youths who experience bullying. *What is the It Gets Better Project?*, IT GETS BETTER PROJECT (last visited Jan. 16, 2015).

93. *Bullying Felony Charges Right or Wrong?*, USATODAY (Oct. 20, 2013, 5:10 PM), http://www.usatoday.com/story/opinion/2013/10/20/cyber-bullying-rebecca-sedwick-charges-florida-column/3110697.

94. H.F. 143, 2013 Gen. Assemb. (Iowa 2013), *available at* http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=hf143; Heather Leigh, *Iowa Bill Could Hold Parents Responsible for Bullying*, SIOUXLAND NEWS, http://www.siouxlandnews.com/story/17590770/iowa-bill-could-hold-parents-responsible-for-bullying (last visited Jan. 16, 2015); Mike Wiser, *Branstad Sees Hope in Another Anti-Bullying Summit*, SIOUX CITY JOURNAL (July 7, 2013, 9:00 AM), http://siouxcityjournal.com/news/local/a1/branstad-sees-hope-in-another-anti-bullying-summit/article_69a59e21-8b70-573d-b5fc-95773d8dc003.html. It ultimately failed to pass during the 2014 legislative session. Connie Ryan Terrel, *Slate Needs to Try Again on Anti-Bullying Bill*, DES MOINES REGISTER (May 24, 2014, 11:17 PM), http://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2014/05/25/state-try-bullying-bill/9561923.

95. This is not a new idea. As Professor Leslie John Harris notes, "Family historian John Demos traced the antecedents of contemporary parental responsibility statutes at least to the seventeenth and eighteenth centuries, when poor parents would be summoned to court, admonished, and if they did not improve, have their children taken away." Leslie Joan Harris, *An Empirical Study of Parental Responsibility Laws: Sending Messages, but What Kind and To Whom?*, 1 UTAH L. REV. 5, 7 (2006).

96. *Parental Liability Laws*, JOHN HOWARD SOC'Y OF ALTA., http://www.johnhoward.ab.ca/pub/C11.htm (last visited Jan. 16, 2015). For a discussion of the similar reasoning underlying parental liability laws in tort, see generally Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533 (2013).

with their own ordinances. In June 2013, the city of Monona, Wisconsin, attracted widespread media attention when it passed a city ordinance holding parents liable for their children's bullying behaviors.[97] The ordinance offers a definition of bullying and other prohibited behaviors, and then provides that "[i]t shall be unlawful for any custodial parent or guardian of any unemancipated person under eighteen (18) years of age to allow or permit such person to violate the provision[ ][prohibiting bullying] above."[98]

Under the Monona ordinance, parents who violate the provision may be fined between $50 and $1000 ("plus 'the costs of prosecution'") for a first offense, and double that for additional violations.[99] According to Monona's police chief, the fines will be levied only in situations in which the parents are uncooperative and do not make an effort to address the bullying.[100] Other cities have followed Monona's lead. For example, in Kansas City, Missouri, the

97. Carol Kuruvilla, *Parents of Bullies in Wisconsin Town to Be Fined for Their Kids' Bad Behavior*, N.Y. DAILY NEWS (June 4, 2013, 5:27 PM), http://www.nydailynews.com/news/national/parents-bullies-fined-kids-behavior-article-1.1363172. No parents had been fined under the ordinance as of April 25, 2014. *Parents Learn About Monona Bullying Ordinance*, MCFARLAND THISTLE (Apr. 25, 2014, 6:15 AM), http://www.hngnews.com/mcfarland_thistle/news/local/article74497836-cb06-11e3-9d87-001a4bcf6878.html. However, Monona Police Det. Sgt. Ryan Losby, who spearheaded the efforts to enact the ordinance, believes that its presence on the books has been an effective deterrent, because "no one wants to fork out $144 for no reason." *Id.* The town of McFarland, Wisconsin, was interested in passing a similar ordinance, though the police chief there expressed concerns with the potential legality, and advocated for "in-depth family counseling and behavior modification training" as a better alternative. *Id.*

98. MONONA, WIS., CODE OF ORDINANCES § 11-2-17 (2013). The ordinance also states that notice serves as a rebuttable presumption that a parent allowed or permitted the bullying:

> The fact that prior to the present offense a parent, guardian or custodian was informed in writing by a law enforcement officer of a separate violation of [the provision prohibiting bullying] by the same minor occurring within ninety (90) days prior to the present offense shall constitute a rebuttable presumption that such parent, guardian or custodian allowed or permitted the present violation.

Id. Presumably, a parent could rebut the presumption with evidence that she took reasonable steps to prohibit the behavior. In a similar instance, a court held that a statute that created parental liability for a child's wrongful act, subject to the defense that the "person took reasonable steps to control the conduct of the child at the time" in question, was still vicarious liability because there was no identifiable act or omission that served as the predicate for culpability. *See* City of Maple Heights v. Ephraim, 898 N.E.2d 974, 978 (Ohio Ct. App. 2008).

99. Eugene Volokh, *Ban on Behavior That "Emotionally Abuse[s]" or "Is Likely to Create an Offensive Environment" and "Which Serves No Legitimate Purpose" + Liability for Parents Who "Allow" Such Speech*, VOLOKH CONSPIRACY (June 3, 2013, 2:30 PM), http://www.volokh.com/2013/06/03/ban-on-behavior-that-emotionally-abuses-or-is-likely-to-create-an-offensive-environment-and-which-serves-no-legitimate-purpose-liability-for-parents-who-allow-such-speech.

100. *Id.*

city council approved an ordinance that would see parents of bullies fined up to $1000, unless they enrolled their child in an antibullying program.[101]

The path to ordinances targeting bullying has been paved by other cities enacting more generalized parental liability statutes.[102] In the 1990s, many states and municipalities began passing such ordinances.[103] Many of these ordinances eliminated the parental-intent requirement that was present in older parental liability laws, and imposed a strict-liability standard instead.[104]

One of the first cities to start this trend was Silverton, Oregon. Silverton passed a law that charges parents with the misdemeanor

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101. The Kansas City Ordinance states:

> It shall be unlawful for the parent, guardian or other person having custody or control of a minor to permit, or by insufficient control to allow, such minor to bully or cyber-bully another minor. Upon conviction of a violation of this subsection, a parent, guardian or other person having custody or control of the minor shall be subject to a fine not to exceed $1,000.00 and costs. In lieu of a fine, the court may impose probation provided that a condition of probation is attendance in an available anti-bullying program either provided by the school district wherein resides the convicted parent, guardian or other person having custody or control of the minor or provided by a group or entity approved by the court.

KANSAS CITY, MO., CODE OF ORDINANCES § 50-244 (2013). *See* Quinn, *supra* note 91. Kansas City has also implemented the crime-free housing program. *See Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/testimonials.htm (last visited Jan. 16, 2015); *infra* text accompanying notes 119–38.

102. Collins et al., *supra* note 15, at 1340. The authors note the fact that these laws are created at the local level means that they are "difficult to survey," and "scholarly estimates" of their prevalence and scope are virtually nonexistent. *Id.* Nevertheless, this Article suggests that media reports and tools like Municode offer at least an overgeneralized picture of what is happening.

103. In 1996, a *New York Times* article noted the "proliferation of 'dozens' of ordinances in towns near Chicago in the 'last two years.'" *Id.* at 1341 n.61 (quoting Peter Applebome, *Parents Face Consequences as Children's Misdeeds Rise*, N.Y. TIMES, Apr. 10, 1996, at A1). Parental responsibility laws parallel those in jurisdictions like "Central America, South America, and Europe," where there is a "'cultural emphasis on family solidarity,'" rather than "'the high value the common law places on individualism.'" Dimitris, *supra* note 11, at 662. It appears that the public perception of an increase in juvenile crime in the 1990s was not based in fact: overall, juvenile crime actually declined by 30 percent from 1993 to 1998. Barton, *supra* note 11, at 879.

104. Portia Allen-Kyle, Note, *Women at the Forefront: An Examination of the Disparate Exposure of Mothers to Liability Under Parental Responsibility Laws*, EXPRESSO (2013), *available at* http://works.bepress.com/portia_allen-kyle. The older parental liability laws expanded the parental liability available at common law. Historically, in tort law, parents were generally "not liable for the acts of their child[ren]." Dimitris, *supra* note 11, at 662. There were four main exceptions to this general rule. Liability could attach if parents "directed or subsequently ratified the act[s]"; if the child "was acting as the parent's agent or servant"; if the child was "entrusted with a dangerous instrumentality, such as a gun, or was negligently given access to an automobile"; or if "the parents' negligence was a proximate cause of the harm." *Id.* at 662, 663.

offense of "'failing to supervise a minor'" whenever a child or youth violates a provision of the Silverton Municipal Code.[105] The violations that trigger parental liability under the ordinance include acts as minor as cigarette smoking.[106] The ordinance allows fines of parents even for a first offense of children up to the age of eighteen.[107] According to the mayor of Silverton, the law has been effective because "'[w]hen their parents are being dragged into it, most kids . . . realize they're not the only ones who pay the price for their actions, and kids begin to take stock of themselves.'"[108] By the time the ordinance was a year old, "approximately a dozen parents had been charged" under it, Oregon state had passed a similar law, and Silverton city officials had received requests from "Europe, Japan, and Australia for copies of their ordinance."[109]

Using the Silverton ordinance as a template, a suburb in Cleveland, Ohio, passed a nearly identical ordinance.[110] Prosecutors there could "criminally charge parents based on the misdeeds of their children" with "a third offense" potentially resulting in parents serving 180 days in jail.[111] Recently, though, the ordinance was struck down on the grounds that it "was inconsistent with a state statute requiring the person charged to commit an act or omission as a predicate for culpability."[112]

Another community, St. Clair Shores, Michigan, enacted a similar law in 1994.[113] According to the St. Clair Shores provision, parents can be held criminally responsible for failing to "'reasonably control'" their children.[114] The ordinance was drafted by two police

105. *Parental Responsibility Laws*, OFF. JUV. JUST. & DELINQ. PREVENTION, http://www.ojjdp.gov/pubs/reform/ch2_d.html (last visited Jan. 16, 2015) (quoting SILVERTON, OR., ORDINANCE 95117 (1995)) (quotation marks omitted).

106. Tyler & Segady, *supra* note 11, at 86.

107. *Id.*

108. Collins et al., *supra* note 15, at 1340 (quotation marks omitted).

109. Tyler & Segady, *supra* note 11, at 87.

110. DAN MARKEL, JENNIFER M. COLLINS & ETHAN J. LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 67 (2009).

111. *Id.*

112. *Id.*

113. Tami Scarola, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice*, 66 FORDHAM L. REV. 1029, 1042 (1997).

114. *Id.* (quotation marks omitted).

officers who were "motivated by juvenile crime increases," and it passed "without debate."[115]

The proliferation of parental liability statutes is likely to continue. Numerous municipalities across America have already implemented parental liability ordinances, and many of those ordinances are "hybrid laws that both lower the mens rea required for the parent and define conduct by a minor that would not be separately subject to criminal sanction as evidence of 'improper parenting.'"[116] These laws are not based on culpable parental transgressions, like active participation or encouragement of the unlawful behavior. Rather, they set "liability for parents based solely on their status as a parent and the misconduct of their child alone."[117] Cities nationwide often consider proposals to extend such liability, and local legislatures will almost certainly "continue to explore regulatory strategies" like this to "reduce juvenile misconduct" and address social problems like bullying.[118]

2. *Crime-Free Ordinances*. In addition to attracting a fine under a parental liability ordinance, a criminal or unlawful act committed by a child or any other household member could also potentially result in the child's entire family's eviction from rental housing under a mandated crime-free lease addendum. If her household lives in a municipality that has passed a crime-free ordinance mandating that landlord–tenant leases must contain a crime-free lease addendum, and the lease accordingly contains such an addendum, the household may be evicted for her unlawful act. The standard crime-free lease addendum requires the eviction of an entire tenant family when a tenant, family or household member, guest, or other person deemed to be under the tenant's control, engages in criminal conduct on—and sometimes even off—the relevant premises.[119] The following is an

115. *Id.*

116. Collins, *supra* note 15, at 1341.

117. *Id.* at 1342–43. The parents will then be able to "plead their good parenting skills as an affirmative defense rather than making the prosecution prove the absence of good parenting as part of its case-in-chief." *Id.* at 1343. Indeed, it is unclear whether parents are actually being punished for the wrongful act of their children, or for their unwillingness to accept law enforcement interventions. *See infra* text accompanying notes 239–46.

118. *Id.* at 1342.

119. See, for example, West Palm Beach, Florida's addendum. *One Strike Policy*, W. PALM BEACH HOUSING AUTH., http://www.wpbha.org/housing/one_strike_policy.html (last visited Jan. 16, 2015).

example of an expansive, yet relatively common, crime-free lease addendum:

> Resident, any member(s) of the resident's household, a guest or any other person affiliated with the resident on or off the premises:
>
> Shall not engage in criminal activity, including drug-related criminal activity, on or off the said premises.[120]

This type of addendum is part of the International Crime Free Association's (ICFA's) programs for rental or multi-unit housing.[121] The ICFA, a not-for-profit started in Arizona in 1992 by a former police officer, markets these programs to municipalities and provides support to those that implement them.[122] Illinois, in particular, has championed this program, with over one hundred municipalities in the state having adopted these ordinances.[123] To fight crime and disorder and promote the goal of security, approximately two thousand cities and towns in forty-four states have implemented the ICFA program.[124] Proponents assert that the Crime-Free Program offers myriad benefits, including "reduced crime, better community awareness, increased property values, more attractive neighborhoods . . . and improved quality of life."[125]

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120. CLARK COUNTY ORDINANCE § 6.12.090 and CITY OF LAS VEGAS CODE § 6.09.020 require all landlords of multihousing units to undergo training, and at the training session landlords are taught to use this addendum. *Crime Free Multi-Housing*, LAS VEGAS METRO. POLICE DEP'T, http://www.lvmpd.com/ProtectYourself/CrimeFreeMultiHousing/tabid/110/default.aspx (last visited Jan. 16, 2015).

121. Art Sharp, *CPTED: Cleaning up the Complexes*, 49 LAW & ORD. 117, 119 (2001). It is also widely used in Canada: cities in three Canadian provinces have implemented the program. For example, in Edmonton, Alberta, it governs over sixteen thousand families. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101.

122. *Crime Free Programs*, INT'L CRIME FREE ASS'N, http://www.crime-free-association.org/index.html (last visited Jan. 16, 2015).

123. EMILY WERTH & SARGENT SHRIVER, NAT'L CTR. ON POVERTY LAW, THE COST OF BEING "CRIME FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 1 (2013).

124. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101. A smattering of these cities have provided positive testimonials on the Crime Free Program's website, including Riverside, California; Kansas City, Missouri; Champlin, Minnesota; Monroe, Georgia; Columbia, Missouri; San Dimas, California; Lenexa, Kansas; St. Cloud, Minnesota; Baton Rouge, Louisiana; Henrico County, Virginia; El Cajon, California; Puyallup, Washington; Waite Park, Minnesota; and Fargo, North Dakota. Locales in other countries, including Canada, Mexico, England, and Finland, have also adopted the ordinances. *See Crime Free Programs*, *supra* note 122.

125. *Crime Free Multi-Housing Program*, CITY OF DUBLIN, CAL., http://www.ci.dublin.ca.us/index.aspx?NID=118 (last visited Jan. 16, 2015).

The Crime-Free Program involves several prongs, including training for property owners and managers, and attention to the physical aspects of security, like lighting and locks.[126] The crime-free lease addendum, however, is the "cornerstone" of the program.[127] The model addendum was originally created by the U.S. Department of Housing and Urban Development, in the form of the one-strike policy applicable only to federal housing projects.[128] The new municipal ordinances import this policy from the public housing context—where it was part of the artillery in the war against drugs—into the private rental housing market at large.[129]

The typical crime-free lease addendum has five notable features. First, in the private rental housing market, the addendum draws multiple third parties into the project of policing. The named tenant or the head of the household and the landlord are both conscripted into the project of crime control. The tenant is required to monitor and deter potentially unlawful behavior, and the landlord is required to evict tenants who fail to do so. Police or other city officials communicate their desire for eviction to the landlord, who must usually comply or face a series of escalating sanctions, including fines or the loss of a business license.[130]

Second, the crime-free lease addendum holds tenants responsible for actions that they may be connected to only tangentially, by virtue of their familial or social relationship with another person. The addendum is based in strict vicarious liability, so although "the tenant herself may have had absolutely nothing to do with the alleged criminal conduct or drug activity, she is nevertheless subject to

126. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101.

127. *Id*.

128. Sharp, *supra* note 121, at 119. For a discussion of the one-strike policy in the context of Section 8 housing, see Michael Zmora, Note, *Between* Rucker *and a Hard Place: The Due Process Void for Section 8 Voucher Holders in No-Fault Evictions*, 103 NW. U. L. REV. 1961 (2009); Wendy J. Kaplan & David Rossman, *Called 'Out' At Home: The One-Strike Eviction Policy and Juvenile Court*, 109 DUKE F. FOR L. & SOC. CHANGE 109 (2011).

129. While crime-free lease addendums have not yet attracted much attention from legal scholars, there is a large body of literature focused on the one-strike policy. Because it formed the precedent for the crime-free lease addendum, and many of the issues surrounding them are similar, this Article uses the one-strike literature where appropriate. *See* Levy, *supra* note 12, at 540.

130. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101. Typically, following some kind of arrest or police involvement, the city will send the landlord a letter, indicating that they must evict their tenants or face a series of sanctions, including fines and the revocation of the rental license. *See, e.g.*, Javinsky-Wenzek v. City of St. Louis Park, 829 F. Supp. 2d 787, 790 (D. Minn. 2011).

eviction for the conduct of the person who actually engaged in the prohibited activity."[131] Indeed, some ordinances "actually specify their intent to penalize the entire household for criminal activity regardless of whether members were aware of the activity or able to control the participants in the activity."[132] It is thought that such an addendum will offer "maximum incentives to tenants to prevent, discover, and remedy" the drug or criminal issues of household members.[133]

Third, a crime-free lease addendum often encompasses a wide spectrum of behaviors, including not just criminal wrongs, but any sort of unlawful act, such as "local ordinance violations, the creation of a nuisance, and/or any conduct that endangers health, safety or welfare."[134]

Fourth, although some versions of these addendums limit the geographical scope to encompass only activities engaged in at the relevant premises, other versions, like the one set out in full above, extend to locations beyond the relevant rental property.[135]

Fifth, and finally, these addendums do not generally require a criminal conviction of any kind. Instead, arrests and simple accusations of criminal or drug-related activity can trigger eviction.[136] This is particularly important when one remembers that order-maintenance policing, which is currently the dominant mode of policing in America, targets misdemeanor and minor or noncriminal offenses. The vast majority of arrests currently made are not for serious crimes, but rather for minor infractions, and under the crime-free program, these arrests are a valid basis for evicting a household.[137] Some ordinances specifically state that arrests or

131. Robert Hornstein, *Litigating Around the Long Shadow of* Department of Housing and Urban Development v. Rucker*: The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Activity Evictions*, 43 U. TOL. L. REV. 1, 4 (2011).

132. WERTH, *supra* note 123, at 12.

133. Reply Brief for the Petitioner, Brief for Respondent at 24, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781), *available at* http://www.justice.gov/osg/brief/hud-v-rucker-reply-merits.

134. WERTH, *supra* note 123, at 4.

135. *Crime Free Testimonials: Keep Illegal Activity Off Rental Property*, *supra* note 101.

136. Hornstein, *supra* note 131, at 275.

137. For example, in New York City in 1989, prior to the adoption of zero-tolerance policing, "there were approximately 86,000 non-felony arrests." K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 N.Y.U. REV. L. & SOC. CHANGE 271, 281, 291 (2009). In 1998, "when the policy was well-entrenched," 176,000 nonfelony arrests were made. *Id.* Further, arrests are a zone fraught with discretion, which unfortunately is often exercised in racially discriminatory ways. "[B]lack youths are

accusations of unlawful activity are sufficient grounds for eviction, whereas other ordinances have the slightly higher requirement that, at an eviction proceeding, criminal activity must be proven to the civil standard of a preponderance of the evidence.[138] Eviction proceedings, however, do not often go all the way to a courtroom because most tenants do not fight their eviction notices.[139]

3. *Nuisance Ordinances*. Nuisance ordinances are often used in conjunction with crime-free lease addendums.[140] They first became popular in the 1980s, mainly as a response to drug dealing.[141] Currently, many large U.S. cities rely on nuisance ordinances as part of their crime-control efforts.[142] Under these ordinances, tenants will be evicted if the police are called to the property more than a threshold number of times, regardless of whether or not the tenant had any participation in the nuisance activity that prompted the calls. Those who pass nuisance ordinances believe that they have many "important long-term benefits," including providing safer and more

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arrested at a disproportionately higher rate than whites," and the discriminatory treatment at the arrest stage is merely the first stop on a two-path system, exacerbated by eviction policies. "When the children of affluent people are caught using drugs, they're apt to end up in treatment programs; the children of poor people are more likely to end up in jail, while their parents may end up on the streets." Renai S. Rodney, *Am I My Mother's Keeper? The Case Against the Use of Juvenile Arrest Records in One-Strike Public Housing Evictions*, 98 NW. U. L. REV. 739, 763 (2004). As one example of race and arrest numbers, in New York City in 2000–2005, "about 86% of people arrested for misdemeanors . . . were nonwhite." Howell, *supra* note 137, at 281, 291.

138. WERTH, *supra* note 123, at 4.

139. *Id.*

140. *Id.*

141. Desmond & Valdez, *supra* note 42, at 120. In 1987, Portland, Oregon, was among the first cities to pass a nuisance-abatement ordinance to address drug dealing. MARTHA J. SMITH & LORRAINE MAZEROLLE, U.S. DEP'T OF JUSTICE, USING CIVIL ACTIONS AGAINST PROPERTY TO CONTROL CRIME PROBLEMS 14 (2013). Many states followed suit, and

> by 1992, 24 U.S. states had passed statutes specifically designed to control drug activities on private properties. A number of these were based on old 'bawdy house' laws designed to curb prostitution. Abatement and eviction notices have been used hand-in-hand to address drug crimes in housing. Abatement actions focus on the property holder while eviction actions focus on the leaseholder or renter, but sometimes it is necessary to provide notice of potential abatement actions to induce the owner to act against the tenant.

Id. (footnotes omitted). Of course, nuisance as a civil cause of action has a much longer history.

142. For example, in 2007, to combat gang activity, Los Angeles County "began using nuisance abatement lawsuits against both the property owners and the specific gang members who allowed or created a nuisance at a particular property," and Seattle, Washington, passed a "chronic nuisance property ordinance" in 2009. *Id.* In Los Angeles County, a chronic-nuisance property is "one where certain crimes, drug-related activities, or gang-related activities occur three times within a 60-day period or seven times within a 12-month period." *Id.* at 16.

appealing communities, increasing property values, and having a general "good effect on quality of life."[143]

A survey combining the nuisance ordinances of the twenty largest U.S. cities with an additional thirty-nine ordinances in cities that varied in location and population revealed that most nuisance ordinances are "strikingly similar."[144] They have three main features.[145] First, the nuisance designation is "based on excessive service calls [i.e. calls to police] made within a certain timeframe."[146] Second, a large and loosely defined set of activities can constitute a nuisance.[147] For instance, one city defines nuisance conduct as

> any activity, conduct, or condition occurring upon private property within the city that unreasonably annoys, injures or endangers the safety, health, morals, comfort or repose of any member of the public; or will, or tend to, alarm, anger or disturb others or provoke breach of the peace, to which the city is required to respond.[148]

Finally, like the crime-free lease addendums, nuisance ordinances demand that landlords perform third-party policing functions and "coerce property owners to 'abate the nuisance' or face fines, property forfeiture, or even incarceration."[149]

As with the crime-free lease addendum, nuisance ordinances coerce both landlords and tenants into performing third-party policing. In many cases, the tenant is not the person who actually causes the nuisance, yet the tenant is the person who will face the legal consequence of the nuisance behavior. One troubling manifestation of this aspect of nuisance ordinances occurs in the context of domestic violence. Female tenants, who have either themselves contacted police or whose neighbors, family members, or friends did so, have been evicted for violating nuisance ordinances in

143. *Municipal Nuisances: South Dakota Municipal League Guide to Public Nuisance Enforcement and Abatement*, S.D. MUNICIPAL LEAGUE, *available at* http://sd.govoffice.com/vertical/sites/%7B2540dc39-a742-459f-8caf-7839ecf21e89%7D/uploads/%7B46e3eb3f-0a31-4411-ade5-83640bfec0d4%7D.pdf.

144. Matthew Desmond & Nicol Valdez, *Online Supplement to Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women* 2 (2013), http://scholar.harvard.edu/files/mdesmond/files/unpolicing.asr2013.online.supplement_0.pdf.

145. *Id*.

146. *Id.* Often, three or four calls a year related to drug activity will be enough to trigger the provisions. *Id*.

147. *Id.*

148. ROBBINSDALE, MINN., CODE § 927.03 (2013).

149. Desmond & Valdez, *supra* note 42, at 120.

connection with their attempts to seek assistance during home violence.[150]

II. RISK MANAGEMENT AND CRIME PREVENTION AT HOME

This Part explains how home rule ordinances configure the home as a site of risk management, crime prevention, and security production. Although homes are usually understood as private spaces, in reality, as Part II.A describes, the state makes numerous interventions into the home, and home rule ordinances are one more such incursion. Home rule ordinances configure the home as a site of security production: a place where criminality must be prevented and the goals of security advanced. Part II.B sets out the means that home rule ordinances use to accomplish these goals. Home rule ordinances compel a set of behaviors that the state believes are "necessary and desirable for the management of social order and stability."[151] These behaviors include acts of surveillance, monitoring, and isolation. This Part discusses how engaging in these compelled behaviors strains social and familial relations, impacts zones of intimacy and trust, and entails a psychic cost upon the person forced to embody the state in this way. Although the sanctions that accompany the home rule ordinances are themselves deeply problematic, the compelled acts that are required to successfully perform third-party policing in the home are perhaps even more worthy of concern.[152]

A. The Dominant Legal and Cultural Constructions of Home

Homes are generally thought of as private spaces, where one can interact with the members of one's family and intimate circle as one pleases, and where, absent domestic abuse or other harms to household members, state intervention is usually unwarranted.[153] As Professor Jeannie Suk explains:

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150. *Id.*

151. Mele, *supra* note 11, at 135.

152. *Id.*

153. SUK, *supra* note 82, at 1; Martha Fineman, *What Place for Family Privacy*, 67 GEO. WASH. L. REV. 1207, 1207 (1999). It should be noted, as Professor Martha Fineman does, that

> [s]omewhat of a dilemma is presented for those of us who view 'privacy' as essential to the concept of family while simultaneously conceding the more modern notion that privacy can conceal, even foster, situations dangerous to the individuals who comprise the family unit. The focus on the necessity of privacy for family formation and functioning arises from concern with abuses associated with state intervention and regulation of intimacy. By contrast, those who are attuned to potential abuses within the family remind us that hidden beneath the cloak of privacy are power imbalances,

> Few concepts are as ubiquitous in ordinary human experience as the home. For most people, the home has formative cultural, emotional, and psychic significance. "Home," as distinct from household or the physical structure of the house, emerged in the nineteenth century as a bourgeois ideal of domesticity and privacy, closely associated with the affective private life of the family. This still evolving concept deeply informs our sense of who we are, and our feelings of safety and belonging.[154]

The home also represents "the metaphorical boundary between private and public spheres," and serves as a nodal site where "the most basic questions about the relation between individuals and state power arise."[155] The idea of the privacy or "sanctity" of the home is recognized and protected in much constitutional jurisprudence, particularly in Fourth Amendment cases.[156] In that context, the Supreme Court has specified that homes are to be protected from excessive government oversight and that the State is not to be "omnipresent in the home."[157] In this construction, respect for the home as a special space has been "embedded in our traditions since the origins of the Republic," and absent compelling reasons, state intervention should be minimal.[158]

Yet, despite this rhetoric, the home is subject to government and institutional interventions on many fronts.[159] Most of these interventions are justified on the basis that they prevent or redress

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> perhaps even incentives for the strong to prey upon or exploit the weak. When we consult the empirical information, it seems both perspectives are warranted.

Id.

154. *Id.* at 1–2.

155. *Id.* at 3.

156. *Id*.

157. Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311, 326 (2013) (quoting Lawrence v. Texas, 539 U.S. 558, 562 (2003)). The privacy of the home has also been critiqued as serving as a "mask for male oppression within families" and a cloak for "the violence against women and children" that occurs in that setting. "But the private sphere ideology, with all its faults, nonetheless also established as a concept the desirability of a space into which the state, absent compelling reasons, was not free to intrude." Martha Albertson Fineman, *Intimacy Outside of the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 968 (1991). Privacy torts, too, support the home as a setting of "spatial intimacy," deserving of significant legal protections. Anderson, *supra*, at 318.

158. Payton v. New York, 445 U.S. 573, 601 (1980). The laws governing the harboring of fugitives also suggest the special status of homes and families. Fourteen states exempt family members from prosecution for this wrongful act. An additional four states offer reduced liability to family members for this offense. Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 U. ILL. L. REV. 1147, 1160 (2007).

159. Fineman, *supra* note 153, at 1207.

harms to others, both inside and outside of the home. For instance, the state now intervenes to protect family members and intimate partners from abuse and mistreatment. Additionally, institutions like school and work have increasing authority over occurrences in the home that may harm others outside of it. To use an example from the bullying context, what a child does at home can now attract disciplinary action from the school.[160] As long as a home-based activity has some impact on school life, it can subject students to school discipline.[161] Similarly, home-based activities that affect the workplace can fall under the umbrella of activities that may subject an employee to workplace discipline.[162]

Of course, some homes have always been subject to more state intervention than others.[163] The privilege of privacy has often had less political potency when applied to housing that has a "public" dimension, like federal housing projects or Section 8 subsidized housing.[164] The one-strike policy in federal housing is a good example of homes being understood as open to public scrutiny and control. Initially, the burden of deterring the criminality of others was placed only on those with homes in federal housing projects, which are thus somehow "public." "For those deemed eligible to live in public housing," the ability to remain in residence there depended "upon [their] adherence to stricter rules and regulations" than those applied to more "private" homes.[165]

Now, crime-free lease ordinances have brought the one-strike policy into the private housing realm, and they, along with parental liability and nuisance ordinances, ensure that more households than ever are responsible for producing security through deterring crime. To deter others, parents and heads of household are expected to perform behaviors involving surveillance, monitoring, and exclusion in cooperation with state recommendations and programs. In these

160. Deborah Ahrens, *Schools, Cyberbullies, and the Surveillance State*, 49 AM. CRIM. L. REV. 1669, 1698 n.142, 1702 n.163 (2012).

161. *Id.*

162. For a discussion of this issue, see Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 672 n.83 (2012).

163. To be sure, state intervention into the home has not meant the same thing historically across race and class.

164. Austin, *supra* note 11, at 273–75.

165. Mele, *supra* note 11, at 136. Those rules were "legitimated by larger political discourses on welfarism, the worthy poor, and drugs and crime." *Id.*

ways, the state is able to intervene inside the home in a rather insidious way: through one's friends and family members.

B. Compelled Compliance Behaviors

To avoid legal sanction, home rule ordinances require parents and heads of household to perform a set of conforming behaviors. These individuals must don the role of "guarantor" or "insurer" of other people's actions and assume an "affirmative obligation" to "monitor and control their own and others' choices of associations and relationships."[166] Tenants must "scrutinize the behaviors of family members, their friends, and visitors within the home and outside of it," and ward off the possibility that one of them will engage in unlawful conduct.[167] Surveillance, monitoring, and isolation are the techniques meant to be employed in this pursuit.

1. *Surveillance and Monitoring.* Surveillance and monitoring are a part of modern life. Gradually, increased surveillance, at least in the public sphere, has become normalized: "[E]ach new surveillance or discipline technique normalizes a certain amount of state intrusion and paves the way for the next program that goes a step further. . . . Step-by-step, panic-by-panic, we have weakened the boundaries that have protected a private sphere."[168] Despite this kind of "surveillance creep," the home, as a traditionally private sphere, has been relatively buffered from the monitoring going on in the outside world. Home rule ordinances, however, require the performance of surveillance and monitoring activities. Through these ordinances, cities have "slipped control, surveillance, and regulation into ordinary everyday behaviors."[169]

One example of "surveillance creep" within the home comes in the context of cyberbullying. To prevent children from being involved with cyberbullying, parents are advised to engage in a series of monitoring activities including using a cellular-phone service plan that grants parents significant control over the child's phone activities, adjusting parental control settings on the Internet, and limiting

166. *Id.* at 135 (quotation marks omitted).

167. *Id.* at 122.

168. Ahrens, *supra* note 160, at 1704. Ahrens's reference is to "a private sphere for public school students." *Id.*

169. Mele, *supra* note 11, at 122.

computer use.[170] These kinds of activities, performed at the behest of the state rather than because the parent believes it to be the best course of action for their particular child, encourage "parents to abandon their traditional role of protecting their children and join in partnership with the state in becoming risk managers."[171] The overall message to parents is that "the repression of criminal conduct must take priority over any other objectives of child rearing and that parents will be expected to accomplish this largely on their own or with what they can purchase."[172]

Performing surveillance activities often comes at a significant cost, not only in terms of personal resources, but also in terms of stress on relationships. It "is not conducive to familial relations to have loved ones forced to play vigilante with one another, constantly in a state of suspicion."[173] At the same time as parents are advised that they should implement the monitoring techniques listed above, they are also warned that they must nevertheless "be mindful that communication is a key aspect of social development and that constant surveillance of their child's Internet use may damage parent-child trust."[174] The kinds of negative impacts that accompany monitoring and surveillance help explain, for example, why a parent may wish to have a school perform drug searches on her children rather than performing them herself:

> [B]y having schools search their children, parents are permitted to maintain a better relationship with their children than they might have otherwise and are spared the effort of personally conducting the search. Parents do not have to confront their children or risk damage to parent/child trust by requesting their children subject themselves to potentially invasive or humiliating searches. If drug testing is the price for participating in school activities and allowing your principal access to your photos is the price for bringing a cell

170. Kevin Turbert, Note, *Faceless Bullies: Legislative and Judicial Responses to Cyberbullying*, 33 SETON HALL LEGIS. J. 651, 689 (2009).

171. Tammy Thurman, *Parental Responsibility Laws/Are They the Answer to Juvenile Delinquency?*, 5 J.L. & FAM. STUD. 99, 106 (2003).

172. SIMON, *supra* note 49, at 202.

173. Timothy E. Heinle, Comment, *Guilty by Association: What the Decision in* Boston Housing Authority v. Garcia *Means for the Innocent Family Members of Criminals Living in Public Housing in Massachusetts*, 35 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 232 (2009).

174. Turbert, *supra* note 170, at 689–90.

> phone to school, then parents plausibly can shift the blame onto schools for policing techniques that are sure to enrage teenagers.[175]

Regardless of whether searches also occur in places outside the home, some courts have agreed with the state's view that parents or tenants should conduct home searches for drugs or other contraband.[176] For instance, in the Supreme Court decision that upheld the one-strike policy, *Department of Housing & Urban Development v. Rucker*,[177] it was noted in her favor that Pearlie Rucker, a sixty-three year old grandmother subject to eviction from a public housing project after her daughter was caught with cocaine a few blocks from the premises, had regularly searched her daughter's room.[178] These efforts may have factored into the housing authority's ultimate decision not to pursue Ms. Rucker's eviction.[179]

At least one court, though, has concluded that asking tenants to search their guests and family members is not an acceptable requirement.[180] In addressing a case in which a tenant was evicted based on a guest's possession of a small amount of drugs, the Ohio Municipal Court held that eviction under these circumstances was tantamount to holding that tenants could simply have no guests, or "equally implausibl[y]" that tenants "must conduct a thorough search of each guest" every time he or she visited.[181] Although this judge believed that tenants should not have to search their guests or socially isolate themselves to avoid eviction, other courts have held that guests in possession of small amounts of drugs are a valid basis for eviction.[182] Thus, heads of household concerned about facing eviction may indeed feel the need to bar guests or search the guests that they do invite to their homes.

2. *Isolation*. Home rule ordinances have isolating effects on kinship and relationship formation. An example from a sociologist's

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175. Ahrens, *supra* note 160, at 1714–15 (footnotes omitted).

176. *See, e.g.*, Dayton Metro. Hous. Auth. v. Kilgore, 958 N.E.2d 187, 192 (Ohio Ct. App. 2011) (holding a tenant strictly liable for the drug offenses of her guests under *Rucker*).

177. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

178. Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001), *rev'd*, *Dep't of Hous. & Urban Dev.*, 535 U.S. 125 (2002).

179. *Id.*

180. Cuyahoga Metro. Hous. Auth. v. Harris, 861 N.E.2d 179, 181 (Ohio Mun. Ct. 2006).

181. *Id.*

182. *See, e.g.*, Dayton Metro. Hous. Auth. v. Kilgore, 958 N.E.2d 187, 192 (Ohio Ct. App. 2011).

study of the mobilization of resident organizations in federal public housing dramatically demonstrates these isolating effects. Describing a public housing project in southeastern North Carolina, the sociologist recounts how just outside the projects, "a small number of African-American men would routinely assemble each morning at a street corner to wait for their girlfriends or wives, who were residents of a nearby housing project, to leave their apartments and cross the street to visit them."[183] It turned out that the men "who had been accused, arrested, or convicted of various criminal infractions, were barred from stepping foot on the project."[184] For their female companions, "the cost of permitting them to visit or stay the night was possible eviction" under the one-strike policy.[185]

For these couples, the one-strike policy altered the terms of their relationships.[186] The female tenant was allowed to keep her home only if she agreed to banish her partner from the premises.[187] For some tenants, then, social and familial isolation is the price of maintaining their homes. The difficulty of sustaining a relationship under these conditions is obvious.[188]

Children are also often banned from the premises as a solution to potential eviction in federal-housing situations.[189] Indeed, when a child's behavior is the trigger for eviction, "the matter is most often settled with an agreement that the child will no longer live in the

183. Christopher Mele & Teresa A. Miller, *Introduction*, *in* CIVIL PENALTIES, SOCIAL CONSEQUENCES, *supra* note 11, at 2.

184. *Id.*

185. *Id.* For another example of how law can directly impact intimate relationships, see King v. Smith, 392 U.S. 309, 334 (1968).

186. This is similar to the situation Professor Jeannie Suk describes in relation to protective orders and domestic law. Suk, *supra* note 81, at 14.

187. Domestic-violence law also encourages partner separation. *See id.* at 53.

188. This is particularly interesting in light of recent studies focused on the connections between marriage, class, and race. *See* CHARLES MURRAY, COMING APART: THE STATE OF WHITE AMERICA, 1960–2010, at 11–13 (2013); RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE? 1–4 (2011). Moreover, "families headed by single mothers, and especially black single mothers," have "been blamed for a myriad of social problems, including unemployment, poor health, school drop-out rates and an increase in juvenile crime." Twila L. Perry, *Family Values, Race, Feminism and Public Policy*, 36 SANTA CLARA L. REV. 345, 345 (1996). Often ignored in these discussions is how such policies exert fracturing pressures on the development of intimate relationships.

189. Austin notes that "[j]ust as in slave times when commercial transactions separated mothers from their children, here too 'kinship' loses meaning since it is subject to termination in the name of property relations." Austin, *supra* note 11, at 286.

unit."[190] "Agreement" may be a strong word in this context, given that the situation reads like "a classic Catch 22. Either the family agrees to dispossess one of its children, or stays together and finds itself out on the street."[191] Such banning procedures have obvious social consequences like "divided families, the surveillance of intimacy," and "the stigma of past behavior."[192]

To avoid the risk that a loved one may engage in wrongful behavior, tenants trying to avoid the operation of crime-free lease addendums may similarly alter the terms of their relationships with others. When eviction is based not on a tenant's level of fault, but on "the relationship established between the leaseholder and covered person," the tenant is left to decide whether the relationship is worth risking her home.[193] Indeed, in the context of public housing, officials have explicitly stated that they want tenants to choose their housing over their families. One city mayor bluntly asserted that, "'[w]e want tenants to understand that if they don't control members of their families, they are going to lose their housing.'"[194] A housing authority director offered a further clarification of this sentiment: "'The head of household is responsible for family members . . . . The message is, don't risk your house; let them [family members] fend for themselves.'"[195] The lines are clearly drawn: a tenant must choose between allegiance to the state, which will require alienating a loved one, or allegiance to her family, which may require her eviction.[196]

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190. Kaplan & Rossman, *supra* note 128, at 109, 119–20. And "forty-four percent of all One Strike cases that are not cancelled or dismissed end in an agreement that the offending member of the household, often a child or grandchild, will be banished from the family home." *Id.* at 120 n.70. The experience of Gloria Franklin and her son serves as one example. Seventeen-year-old Tyran Pratt was arrested "allegedly with $10 worth of marijuana" outside of his mother's home. Although the charge against him was dismissed, the housing authority required his mother to ban him from the premises or otherwise face eviction. As a newspaper article describes,

> Franklin got choked up recalling the moment she told her son. It was one of the most difficult points in her life, she said. "I gave him a hug, shared a few tears, and I just told him, 'You have to go; I'm sorry,'" Franklin added. Since Pratt left last summer, Franklin says she hasn't seen him much. He dropped out of school and has been living on the streets. Sometimes he'll call when he's hungry, and she'll bring him food. And other times she sees him sleeping in a playground near her house, a sight she describes as "one of the most hurtful things."

Dylan Cinti, *Dismantling Families*, CHI. REP., Sept. 1, 2011, at 17.

191. Kaplan & Rossman, *supra* note 128, at 120.

192. Mele, *supra* note 11, at 2.

193. *Id.* at 128.

194. Weil, *supra* note 11, at 171 (quotation marks omitted).

195. *Id.* (quotation marks omitted).

196. For more on this kind of conflict between obligations to the family and obligations to the state, see MARKEL ET AL., *supra* note 110, at 6–8.

For tenants who do not feel that they have the ability to closely monitor or deter family members from wrongdoing, banishing these individuals and isolating their households may be the only viable option. These tenants may feel "overbearing pressure" to "close their households" as a means of safeguarding their homes against potential eviction.[197] This is particularly true because of the no-fault basis for evictions: even if the tenant makes a best-efforts attempt to deter family members, if those attempts are unsuccessful, eviction will follow. So, "[f]or instance, where a parent or grand-parent has no realistic means of controlling the conduct of their adolescent children or grandchildren at all times and at all places, the only way for the tenant to minimize the risk of eviction . . . is to exclude their children or grandchildren from the apartment altogether."[198] Such exclusion comes at a profound social and psychic cost. Through home rule ordinances, the state decides for whom families can care, and how they can care for them.

Another important type of isolation that home rule ordinances create occurs in the context of nuisance citations based in domestic violence. Nuisance ordinances discourage tenants experiencing domestic violence from calling the police because such calls lead to nuisance citations, and nuisance citations lead to eviction.[199] Many not-for-profit groups providing assistance to women suffering domestic abuse note that clients regularly state that they are not calling police for assistance, even when they desperately need it, because they fear eviction.[200] In other words, these nuisance

197. Brief for Respondents, *supra* note 133, at 92, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (No. 00-1770).

198. *Id*. These ordinances may also dissuade tenants from letting recently paroled family members or intimate partners live with them. They may fear that the paroled person "will get back in trouble," and cost them their housing. This is an additional negative impact on an already difficult reintegration process. *See* Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 426 (2011).

199. Erik Eckholm, *Victims' Dilemma: 911 Calls Can Bring Eviction*, N.Y. TIMES, Aug. 16, 2013, at A1, *available at* http://www.nytimes.com/2013/08/17/us/victims-dilemma-911-calls-can-bring-eviction.html.

200. According to one grassroots domestic-violence group in a small metropolitan area, two families accessed their emergency shelter in one month "to avoid calling police for fear of evictions." Statement of Interest: Alle-Kiski Area HOPE Center, Inc., Briggs v. Borough of Norristown (E.D. Pa. May 31, 2013) (No. 2:13-cv-2191), *available at* https://www.aclu.org/files/assets/2013_05_31_appendix_a_-_amici_statements_of_interest.pdf. Further, there is a history of police ignoring women's requests for assistance with domestic violence. In the 1970s and 1980s, police ignored "the pleas of women seeking assistance simply because their assailants were their husbands." LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 106 (2012). In *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D.

ordinances encourage battered women to isolate themselves from society and from "the 'protective arm' of the state."[201] This was illustrated in a case that the American Civil Liberties Union (ACLU) initiated on behalf of Lakisha Briggs, after the fear of eviction prevented her from calling police during a nearly lethal attack by her former boyfriend.[202] The attack required her to be airlifted to a hospital for emergency treatment, and she survived only because a neighbor called the police.[203] She did indeed face eviction proceedings upon her return from hospital.[204]

III. THE ROLE OF STRICT VICARIOUS LIABILITY

Even if one does engage in the acts of surveillance, monitoring, and isolation that the home rule ordinances require, those efforts may not be successful. This Part sets out how the strict vicarious liability standard of the home rule ordinances allows for the imposition of legal sanction, regardless of fault. Part III.A describes how the home rule ordinances are "no-fault" laws, meaning that, as a policy matter, they apply in the absence of what we normally consider to be morally culpable behavior. The unlawful act of a household member, friend, or guest, plus a relationship between that person and the parents or tenants, is enough to trigger the sanction associated with the

Conn. 1984), a plaintiff was awarded $2.3 million after police stood by while her husband "dropped the knife that dripped with his wife's blood," kicked her "repeatedly in the head," and tried to attack her again "while she was lying on a stretcher, waiting for medical treatment." GOODMARK, *supra*, at 106.

201. Desmond & Valdez, *supra* note 42, at 138.

202. Lakisha Briggs rented under the Section 8 voucher program. Ninety percent of Section 8 households are female-headed, and 30 percent of those women are disabled; 84 percent of Section 8 households have children, with children making up 55 percent of all people assisted by Section 8. Phil Steinhaus, *Those Aided by Section 8 Not Criminals*, COLUM. TRIB. (Jan. 4, 2009), http://archive.columbiatribune.com/2009/Jan/20090104Comm008.asp.

203. One of the grounds of the lawsuit is that it violates the right to petition. Calling 911 is a citizen's "primary source of communication with the police." Desmond & Valdez, *supra* note 42; *see also* Tamara L. Kuennen, *Recognizing the Right to Petition for Victims of Domestic Violence*, 81 FORDHAM L. REV. 837, 837 (2012) (arguing that the police practice of calling Child Protective Services when a mother experiences domestic violence violates her First Amendment right "to petition the Government for a redress of grievances").

204. Eckholm, *supra* note 199. Similarly, a landlord initiated eviction proceedings against Veronica Maffeo in Boston, Massachusetts, on the basis that "she caused a disturbance when she screamed for help" during a domestic assault perpetrated by her ex-boyfriend. Brief of Amici Curiae of the National Network to End Domestic Violence at 3, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (No. 00-1770), 2001 WL 1663790 (citing Def's Mot. To Vacate J., New Trial, Weston Assoc. v. Veronica Maffeo at ¶ 4 (Hous. Ct. Dep't, Boston Div., filed Sept. 2001) (Docket No. 01-SP-03935)).

ordinance. This reality sits uncomfortably with our usual commitment to punishment on the basis of individual culpability. Perhaps because of this discomfort, extralegal narratives of fault have sprung up around these ordinances. Those who advocate for and enforce these provisions have constructed narratives of fault to rationalize the imposition of legal sanctions in these circumstances.

In many important ways, vicarious liability in this context ends up conflating vulnerability with fault. Part III.B outlines how home rule ordinances essentially penalize parents and tenants for lacking the ability to control the behavior of others, even though it is arguably very difficult for anyone to truly control the behavior of another. Moreover, home rule ordinances tend to have the most impact upon members of vulnerable groups, such as minorities, the poor, and female-headed households, creating problematic connections between vulnerability, fault, and the inability to control others.

Further, as Part III.C discusses, the vicarious liability nature of the home rule ordinances has an additional consequence: a profound framing effect that assigns blame to both the wrongdoer and his or her social and familial relations. Left outside of this frame are larger, structural factors that are heavily correlated with crime and drug abuse, such as poverty, economic inequality, and lack of opportunity.

A. Individual Culpability and Narratives of Fault

The idea of "individual culpability for wrongdoing" is a foundational principle of the American legal system.[205] As one judge phrased it, "Our demand that responsibility be personal" is a communal value, "the result of the 'inarticulate, subconscious sense of justice of the [person] on the street.'"[206] Strict vicarious liability, in which a person is liable for another's actions even though he or she has not personally engaged in any wrongdoing, seems to fly in the

205. James Massey, Susan L. Miller & Anna Wilhelmi, *Civil Forfeiture of Property: The Victimization of Women as Innocent Owners and Third Parties*, *in* SUSAN L. MILLER, CRIME CONTROL AND WOMEN: FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY 15, 15 (Susan L. Miller ed., 1998).

206. City of Maple Heights v. Ephraim, 898 N.E.2d 974, 982 (Ohio Ct. App. 2008) (alteration in original) (quoting Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 103 (1985)) (technically speaking about criminal vicarious liability). Though, given the blurring of criminal and civil lines here, the comments are applicable to these scenarios as well.

face of that.[207] It is an "exception to the usual rule that each person is accountable for his own legal fault, but in the absence of such fault, is not responsible for the actions of others."[208] Nevertheless, in a variety of contexts, we do allow strict or vicarious liability to exist without experiencing too much existential angst.[209] Strict liability is a fairly common feature of contract and tort law, and its manifestations in the form of "vicarious, corporate, and joint and several liability" are not regarded as particularly controversial.[210] For example, the doctrine of respondeat superior, which holds employers vicariously liable for the acts of their employees, is a well-accepted application of strict liability.[211] Vicarious liability is currently understood mainly as a policy device to transfer risk to the person who profits from it, is best able to avoid it, and can best financially manage it.[212]

Vicarious liability most often concerns business relationships, like "employer-employee, corporation-manager, buyer-seller, producer-consumer, and service provider-recipient."[213] But the idea of strict vicarious liability is no stranger to the domestic or family context.[214] Rather, "the tendency to include secondary social others as responsible for the crime, deviance, and the sins of family members, friends and significant others is well-established in the human experience,"[215] and "[f]amilial responsibility has been a consistent

207. Technically, strict liability and vicarious liability are not the same concept, but much of the literature on parental liability and the one-strike policy uses these terms interchangeably. Strict liability is "a concept associated principally with the law of torts" and "is popularly understood to mean liability without fault." Hornstein, *supra* note 131, at 263. Vicarious liability, on the other hand, exists when the conduct of a third party is imputed to the defendant. Vicarious liability is "a form of strict liability." *Id.* at 264.

208. DAN B. DOBBS, THE LAW OF TORTS § 333 (2000).

209. Levinson, *supra* note 69, at 361.

210. *Id*. at 421. Vicarious liability is deeply tied to the notion of agency. It can also apply when one has entrusted another with her property. For example, in *Van Oster v. Kansas*, 272 U.S. 465 (1926), the Supreme Court upheld the forfeiture of a vehicle used to illegally transport liquor by someone to whom the owner had entrusted the vehicle. SAMAHA, *supra* note 9, at 229.

211. Interestingly, the philosopher and jurist Jeremy Bentham linked this doctrine to the concept of policing. He used the metaphor of policing to describe how respondeat superior operated to ensure that that the master would act as an "inspector of police, a domestic magistrate" for a servant's torts. Kraakman, *supra* note 28, at 53 n.1. It should also be noted that this kind of liability originated in the household. Levinson, *supra* note 69, at 354 n.34.

212. *See* PAULA GILIKER, VICARIOUS LIABILITY IN TORT: A COMPARATIVE PERSPECTIVE 90 (2010).

213. SAMAHA, *supra* note 9, at 208.

214. Indeed, state statutes and ordinances in which parents are held vicariously liable for their children's wrongful actions are now relatively common. *Id.* at 230.

215. Massey et al., *supra* note 205, at 15.

theme in legal and social sanctioning regimes since ancient times."[216] Historically, many cultures have viewed clans and families, not individuals, as their primary "jural unit" or "relevant unit of moral agency and blame," and group responsibility has functioned as the dominant legal norm.[217]

Modern thought has, however, replaced the ancient notion that the "sins of the father will be visited upon the children"[218] with a focus on individual rights and responsibilities. Now, the idea of "individual culpability for wrongdoing, especially in the case of criminal behavior . . . forms the very foundation for the administration of justice in Western societies."[219] In general, we, as a society, have the sense that although a person can sometimes be justly held responsible for contributing to another person's wrongdoing, we are deeply troubled by concerns of "'punishing the innocent,' imposing 'guilt by association,' or 'failing to treat people as individuals.'"[220]

Now, when strict liability is brought into the home, it affronts our modern sense that only individuals who are themselves culpable should be held legally liable. For instance, the crime-free lease addendums would allow "eviction of an entire family if a tenant's child was visiting friends on the other side of the country and was caught smoking marijuana, even if the parents had no idea the child had ever engaged in such activity and even if they had no realistic way to control their child's actions 3,000 miles away."[221] The "principle of house-hold wide responsibility" for such a wrong can strike the modern conscience as profoundly unfair, as can the eviction of a family making best efforts to care for its members and avoid

216. Levinson, *supra* note 69, at 411.

217. MARK S. WEINER, THE RULE OF THE CLAN: WHAT AN ANCIENT FORM OF SOCIAL ORGANIZATION REVEALS ABOUT THE FUTURE OF INDIVIDUAL FREEDOM 1, 3 (2013); Levinson, *supra* note 69, at 348.

218. This phrase, and its variations, appears in many Western canonical texts, including the Bible, Shakespeare's *The Merchant of Venice*, and Euripides. *See, e.g.*, EURIPIDES, FRAGMENTS 563, Frag. 980 (Christopher Collard & Martin Cropp eds. & trans., Harvard Univ. Press 2008).

219. Massey et al., *supra* note 205, at 15.

220. Levinson, *supra* note 69, at 348.

221. Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001), *rev'd*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002). Most of the one-strike cases are about drug possession: one study of the one-strike policy cases in Chicago found that over 70 percent of cases involved drug possession, and less than 10 percent involved drug dealing. Angela Caputo, *One and Done*, CHI. REP. (Sept. 1, 2011), http://chicagoreporter.com/one-and-done. In 2010, 76 percent of arrests leading to eviction were for misdemeanors. *Id.*

criminality, such as when a family member is on a waitlist for a drug-treatment program.[222]

Courts and other judicial actors have often indicated difficulties with accepting as legitimate the strict-liability nature of home rule ordinances. For instance, in one case, a jury held that eviction of a mother and her children, ranging in age from sixteen to twenty-five, was unwarranted, despite facts stipulating to the son's drug use.[223] Also, a judge in the public housing context expressly noted that although she felt bound by the decision in *Rucker*, she had great difficulty trying to "reconcile fundamental principles of fairness and due process with a finding that wholly innocent persons can be punished for the criminal activity of others of which they had no knowledge and over which they had no control."[224]

Many courts have expressed similar concerns when presented with situations in which vicarious liability results in criminal sanctions.[225] Some courts have found that in minor misdemeanor cases, when the punishment at issue is only a "slight fine and not imprisonment," vicarious criminal liability does not violate due process, but other courts have held that this does violate due process, and that the consequences of a criminal conviction "cannot rest on so frail a reed" as whether someone else will "commit a mistake in judgment."[226] Nevertheless, when vicarious liability is upheld, it is often justified by the deterrent effect it is supposed to have on both the wrongdoer and the person ultimately held responsible.[227]

At its worst, vicarious liability seems to involve "the sacrifice of innocent individuals on the altar of some allegedly worthy social purpose."[228] It conflicts with the deeply held belief that unless a person "has done something to deserve and warrant punishment, the state lacks moral and political authority to move against him, at least in a democratic state committed to liberal values of individual liberty

222. The phrase "principle of household-wide responsibility" was used in the Reply Brief for the Department of Housing and Urban Development in the *Rucker* case. Weil, *supra* note 11, at 177.

223. The court issued a judgment notwithstanding the verdict. Jamie's Place I LLC v. Reyes, No. L&T252658/08, 2009 WL 4282852 (Table), at *4 (N.Y. Civ. Ct. Oct. 22, 2009).

224. Hous. Auth. of Joliet v. Chapman, 780 N.E.2d 1106, 1108 (Ill. App. Ct. 2002) (McDade, J., concurring).

225. SAMAHA, *supra* note 9, at 229.

226. Commonwealth v. Koczwara, 155 A.2d 825, 830 (Pa. 1959) (citing Francis Bowes Sayre, *Criminal Responsibility for Acts of Another*, 43 HARV. L. REV. 689 (1930)).

227. *Id*.

228. Brief for Respondents, *supra* note 133, at 56.

and autonomy."[229] In the context of home rule ordinances, where someone faces significant legal sanctions as a result of their relationship with another person somehow connected to their home, and not based on their own wrongdoing, vicarious liability seems particularly egregious.

Therefore, it is perhaps unsurprising that supporters of these kinds of ordinances have constructed narratives of fault around them. According to these narratives, those who are subject to home rule ordinances are, in some extralegal sense, blameworthy. Although not technically "at fault" in the legal sense, they are constructed as at fault in some larger moral sense. It seems that the absence of a legal fault element has created a void into which a nonlegal fault element has grown—to justify the use of strict liability and its accordant legal sanctions in this context.

1. *Failing to Govern and Be Governed.* One narrative of fault at work in the context of home rule ordinances is that the tenant or parent is at fault both in relation to her ability to *govern* and in relation to her willingness to *be governed*. The state arguably "regards the polity as a household, the occupants of which must be disciplined and directed," and must in turn discipline and direct their own households.[230] Government is, in some sense, a form of household management, and household management is, conversely, an important part of state governance.[231] The idea of a "family government" that is a microcosm for the larger state is an old one: Aristotle began his *Politics* with a discussion of household governance, and how households are the "original seed of the polis."[232] Ordered homes become the prerequisite for an ordered state, and households struggling with social issues become a threat to

229. Alexandra Natapoff, *Aggregation and Urban Misdemeanors*, 40 FORDHAM URB. L.J. 1043, 1050–51 (2013).

230. Alec C. Ewald, *Collateral Consequences and the Perils of Categorical Ambiguity*, *in* LAW AS PUNISHMENT / LAW AS REGULATION, *supra* note 77, at 77, 80.

231. Markus Dirk Dubber, "*The Power to Govern Men and Things": Patriarchal Origins of the Police Power in American Law*, 52 BUFF. L. REV. 1277, 1277 (2004). Further, as scholars Elizabeth Burney and Loraine Gelsthorpe write, "[t]he State traditionally supports the ideal of well-functioning families, as a crucial element in the social order." Elizabeth Burney & Loraine Gelsthorpe, *Do We Need A 'Naughty Step'? Rethinking the Parenting Order After Ten Years*, 47 HOW. J. 470, 470 (2008); *see also* Noa Ben-Asher, *The Lawmaking Family*, 90 WASH. U. L. REV. 363, 363 (2012) (arguing that families create internal legal systems that govern their daily lives).

232. Dubber, *supra* note 77, at 30.

that order.[233] Indeed, the connection between home governance and state governance has a special resonance at the city level, where Western culture has long mythologized that what happens in the household has a direct impact on the city.[234]

The idea that a failure to govern one's household is wrongful and thus may justifiably attract sanctions is particularly salient in the context of parental liability ordinances. Parental liability ordinances are often justified based on the intuition that "'bad' parents should be disciplined" for their failure to govern their households correctly.[235] Essentially, the child's unlawful act demonstrates that the parents are "bad" at "ruling the roost," and it is therefore fair to impose penalties on them.[236]

Of course, the implicit assumption underlying the notion that a child's unlawful act shows that his or her parents are "bad" is that good parents generally have control over their children.[237] However, many parents and other people who have worked with or spent time with children and teenagers believe this assumption to be "unrealistic and naïve."[238] In reality, parents have quite limited means to actually control the behavior of their children, and even parents who "do everything right" may nevertheless have children who engage in misconduct.[239] This is in part because of the myriad factors that contribute to a child's behavior, of which parental influence is just

233. This is the flip side to the "notion oft heard that strong families lead to a strong nation." MARKEL ET AL., *supra* note 158, at 1189.

234. The story of Oedipus helps to illustrate this point: his murder of his father created disorder in his family and household, and thus disorder in the city, in the form of the "plague upon Thebes." Levinson, *supra* note 69, at 354.

235. Amy L. Tomaszewski, Note, *From Columbine to Kazaa: Parental Liability in a New World*, 2005 U. ILL. L. REV. 573, 579 (2005) (citing Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 624 (1997)).

236. In other words, a child's wrongful act justifies a "role [for] politics [] where families have failed." F. FIELD, NEIGHBOURS FROM HELL: THE POLITICS OF BEHAVIOUR (2003); John Flint & Judy Nixon, *Governing Neighbours: Anti-Social Behavior Orders and New Forms of Regulating Conduct in the UK*, 43 URB. STUD. 939, 948 (2006) (quoting FIELD, *supra*).

237. Elena R. Laskin, *How Parental Liability Statutes Criminalize and Stigmatize Minority Mothers*, 37 AM. CRIM. L. REV. 1195, 1206 (2000).

238. *Id.*

239. "No doubt family environment exerts significant influence on a child's behavior. But on closer examination, scapegoating parents paints a remarkably incomplete picture. Indeed, in many families, parents may no longer be capable of influencing the behavior of their children. Many other powerful forces compete today for that role in teenagers' lives." Min Kang, *Parents as Scapegoats*, 16 J. CONTEMP. LEGAL ISSUES 15, 19 (2007).

one among many.[240] Another powerful force is enculturation, or the environment in which children grow up. Most bullying experts will readily agree that peer groups play an important—if not the most important—role in whether children engage in bullying behaviors. Parental liability ordinances, though, appear to be "based entirely on folk wisdom" that parents should be able to control their children all the time.[241] If they cannot, then they can be "coercively taught parenting skills, so they will become in control (and presumably then can be punished by harsher means if the children continue their delinquent behavior)."[242]

In addition to suggesting that a failure to govern one's household is blameworthy, home rule ordinances also blame parents and tenants for a reluctance to *be governed*. For instance, the narratives surrounding parental liability laws suggest that they will be levied when cities decide that parents are being *uncooperative* with them.[243] In the case of the Monona, Wisconsin, ordinance that holds parents liable for their children's bullying behaviors, Monona's police chief has indicated that fines will be levied only in situations in which the parents are uncooperative and do not make efforts to address the bullying.[244] This theme of uncooperativeness also occurs in parental liability laws at the state level: the proposed, but ultimately defeated, Iowa bill that sought to hold parents responsible for their children's bullying was also rooted in parental cooperation with the state.[245] The first level of intervention was to be notification of the bullying behavior and an attempt to "work[] with the family" to address it.[246] If parents resisted this intervention, the second level was court

240. "Most criminology and sociology theories, as well as empirical studies, generally indicate that not only the family, but economic status, academic achievement, racism and discrimination, peer groups, community attachment and susceptibility to media affects a child's propensity" to engage in misconduct. Tammy Thurman, *Parental Responsibility Laws: Are They The Answer to Juvenile Delinquency?*, 5 J.L. & FAM. STUD. 99, 107 (2003).

241. Chapin, *supra* note 235, at 654.

242. *Id.* (emphasis omitted).

243. Similar ideas regarding duties to cooperate can be found in the welfare and child support context. *See* Naomi Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965, 973–80 (1997).

244. Kuruvilla, *supra* note 97.

245. H.F. 143, 2013 Gen. Assemb. (Iowa 2013), *available at* http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=billinfo&Service=Billbook&menu=false&hbill=hf143.

246. Leigh, *supra* note 94.

mediation.[247] The final level was prosecution, which could result in "community service, fines, or even jail time."[248]

Penalizing parental uncooperativeness can also be seen in state laws addressing truancy. A truancy reduction program in Michigan, for example, provided that when "parents *did not cooperate with school officials*, a warrant was sought for parental prosecution under the state's compulsory attendance law. *The key phrase here was that the parents targeted were uncooperative*."[249]

This same language of cooperation was echoed in a town's reasoning regarding enacting a chronic-nuisance ordinance that was meant to apply to domestic-abuse situations:

> It's always disheartening for police officers to get calls that a boyfriend is beating up a girlfriend, and then the girlfriend drops the charges within a few days. It's more frustrating when the offenders repeat the process over and over. . . . In addition, it's a big waste of taxpayers' dollars when police have to respond to nuisance calls and then to court without the benefit of cooperation from those who complained in the first place.[250]

Cooperation also figures into the common practice of ordering women to get restraining orders against their intimate partners to avoid evictions under nuisance ordinances.[251] If they refuse to cooperate and accept this form of city governance, eviction can follow. Compliance with a state notion of best practices for home governance becomes a requirement of maintaining stable housing and

247. *Id.*

248. *Id.*

249. Justin W. Patchin, *Holding Parents Responsible for Their Child's Bullying*, CYBERBULLYING RES. CENTER (June 17, 2013), http://cyberbullying.us/holding-parents-responsible-for-their-childs-bullying (second emphasis added). Professor Patchin also noted, however, that in reality, "[o]nly 3 parents out of the nearly 300 families involved in the program fell into [the uncooperative] category." *Id.* Most parents seem willing to help tackle their children's bullying behaviors, as attested to by the fact that the informational brochure entitled "What If My Child Is The Bully?" is "one of the most frequently downloaded handouts on the website." A. Pawlowski, *Community Will Ticket Parents of Chronic Bullies*, TODAY (June 3, 2013, 1:59 PM), http://www.today.com/moms/community-will-ticket-parents-chronic-bullies-6C10172548.

250. Rebecca Licavoli Adams, Note, *California Eviction Protections for Victims of Domestic Violence: Additional Protections or Additional Problems?*, 9 HASTINGS RACE & POVERTY L.J. 1, 12 (2012) (quoting Ron Gower, *Police Calls: Responsibility Will Be Required in Coaldale*, TIMES NEWS, Mar. 13, 2006, at 1).

251. For a discussion of this issue, see Suk, *supra* note 81, at 7.

avoiding legal penalty.[252] Failure to cooperate or to be governed in this regard is portrayed as blameworthy, and thus able to legitimately attract legal sanctions.

2. *Failing to Control Criminality*. In the nuisance context, the failure to govern one's household is linked to another powerful narrative of blame: the failure to control another's violence or criminality. In addition to placing blame on parents and tenants for failing to govern their households, when nuisance is based in domestic violence, a story is told in which an individual's failure to control another's criminality is blameworthy. In this narrative, those who experience domestic violence are specifically faulted for failing to control their partner's behavior.[253] According to this story, their failure to control the abuse *is* blameworthy and *should* attract the sanction of eviction.

Many nuisance citations and evictions come from domestic-violence incidents.[254] Indeed, a recent groundbreaking study analyzing all the nuisance citations issued in Milwaukee, Wisconsin, in 2008 and 2009 found that nearly a third of these citations were generated by

252. For example, Lakisha Briggs, the Pennsylvania woman who was evicted after her boyfriend nearly killed her, was, prior to her eviction, "ordered to obtain assistance from the justice system [in the form of a Protection from Abuse order] as a condition to maintaining her housing, regardless of her fears of future and escalated violence." Brief of Amicus Curiae of the Pennsylvania Coalition Against Domestic Violence, et al. at 20, Briggs v. Norristown (E.D. Pa. May 31, 2013) (No. 2:13-cv-2191).

253. This narrative falls into the gendered tradition of holding women responsible for men's criminality. This tradition is most obvious in the context of sexual assault, where "to some extent criminal justice officials (and others) have always considered female victims of sexual assault and rape as responsible for failing to minimize the opportunities for the offense." Sharyn L. Roach Anleu, *The Role of Civil Sanctions in Social Control: A Socio-Legal Examination*, *in* CIVIL REMEDIES AND CRIME PREVENTION 21, 34 (Lorraine Green Mazerolle & Jan Roehl eds., 1998).

254. Dekalb, Chicago, offers an example of the number of nuisance citations connected to domestic violence. The city reported that in 2013, it notified landlords of 489 calls to police that could trigger eviction. Katie Dahlstrom, *DeKalb's Crime Free Housing Program Gets Mixed Reviews*, DAILY CHRONICLE (Feb. 27, 2014, 3:36 PM), http://www.daily-chronicle.com/2014/02/26/dekalbs-crime-free-housing-program-gets-mixed-reviews/ajjphlv/?page=1. The reasons for the calls to police were varied. "100 were for disorderly house complaints—loud parties or noise late at night. Another 97 were domestic battery and 45 were for possession of marijuana. The remainder ran the gamut from underage drinking to mob action." *Id.* Of those, 56 resulted in eviction, 31 resulted in individuals being barred from a particular residence, and 18 tenants left "voluntarily." *Id.*

domestic violence.[255] The same study quoted many instances in which both landlords and the police who worked with them to evict tenants under the nuisance ordinances blamed female tenants for the "nuisance" associated with domestic abuse incidents.[256] Landlords and police explicitly "assigned to battered women the responsibility for curbing the abuse" and often viewed eviction as the natural and *fair* consequence of a failure to do so.[257] One Milwaukee landlord (described as "a middle-aged white man who owns 114 units, mostly in poor black neighborhoods"), offered his views on nuisance citations related to domestic violence at his properties:

> Like I tell my tenants: You can't be calling the police because your boyfriend hit you again. They're not your big babysitter. It happened last week, and you threw him out. But then *you let him back in*, and it happens again and again. Either *learn from the first experience or, you know, leave.* Don't take him back and get hit because you tell him, I don't know, "I don't want to sleep with you."[258]

Another landlord warned his tenant in a letter:

> Because the numerous calls from this address, the police has [*sic*] identified the property as a nuisance property. . . . Many of the calls involved physical altercations with another individual, identified as your boyfriend and ex-boyfriend who appears to be living at the unit. . . . This is *your notice to cease this behavior and to cure these problems*. . . . If these activities continue, your lease will be terminated.[259]

And in a letter to the Milwaukee Police Department, from whom most of the eviction directives originated,[260] one landlord wrote:

> The Tenants have been required to vacate the unit or terminate the causes via a 30-day [eviction] notice. It does not matter if they are

255. Desmond & Valdez, *supra* note 42, at 118. It should be noted that the study excluded public housing "[b]ecause the nuisance property ordinance focuses on the private housing market." *Id.* at 123.

256. *Id.*

257. *Id*. at 134.

258. *Id*. at 131 (emphasis added).

259. *Id*. at 134 (alterations in original) (emphasis added).

260. The nuisance ordinances are usually enforced in the following manner: a city official who has received a report from the police regarding an incident sends a letter to the landlord, indicating that the landlord must evict or face a series of escalating sanctions. The landlord is often requested to write a letter in response indicating what actions have been or will be taken. *Id*. at 122.

> the cause of the problems or not. It is their responsibility to prevent the problems at all times.[261]

And in yet another example of a letter to the police, another local landlord wrote:

> First, we are evicting Sheila M., the caller for numerous help [*sic*] from police. . . . She has been beaten by her "man" who kicks in doors and goes to jail for 1 or 2 days. . . . *We suggested she obtain a gun and kill him in self-defense, but evidently she hasn't. Therefore, we are evicting her.*[262]

Leaving aside the profoundly disturbing suggestion in the above quote—that a woman suffering domestic abuse must engage in the compliance behavior of shooting her husband to avoid eviction—these examples suggest that landlords and police construct their own notions of a tenant's fault, one rooted in the failure of abused women to control their intimate partners and stop the violence directed at them.[263] This narrative, and the sentiments behind it, were echoed in the comments to a *New York Times* article about domestic violence and nuisance evictions. One landlord wrote, "'*if the tenant is unwilling to make better judgments about the men they allow to live with their children*, then we feel we have to act.'"[264] According to this narrative, female tenants who experience domestic abuse are at fault for not exercising better judgment, for not leaving, and for failing to control the violence of their intimate partners.[265]

B. Vulnerability as Fault

Arguably, the real "nuisance" being targeted in these domestic-violence instances is a person's vulnerability. A call to 911 is a call for

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261. *Id.* at 135 (alteration in original) (emphasis added).

262. *Id.* (emphasis added) (quotation marks omitted).

263. Other examples include a landlord who "noted that a tenant's 911 abuse calls had to do with a 'domestic violence issue that *she seems to have no ability to control*.' The landlord continued, 'Her lease is up at the end of May and she has been counseled that *if her behavior does not change* she will also be non-renewed.'" *Id.* (emphasis added).

264. Max Liboiron, *Twenty-First Century Nuisance Law and the Continued Entanglement of Race, Gender, Property, and Violence*, DISCARD STUD. (Aug. 19, 2013), http://discardstudies.wordpress.com/2013/08/19/twenty-first-century-nuisance-law-and-the-continued-entanglement-of-race-gender-property-and-violence (emphasis added).

265. This is particularly troubling when one considers that domestic violence itself is "a crime of control." Adams, *supra* note 250, at 4 (citing John C. Nelson, Ronald B. Adrine, Elaine Alpert, Sara Buel & Corinne Graffunder, *Domestic Violence in the Adult Years*, 33 J.L. MED. & ETHICS 28, 29 (2005)).

help, an expressed *need for assistance*. Under the nuisance ordinances, this call is also the basis for eviction.[266] One explicit rationale behind nuisance ordinances is the idea that the residents in these properties are overusing the limited resources of police and emergency personnel; the need that is prompting these visits is cast as excessive.[267]

Indeed, there are important links between vulnerability and home rule ordinances at large.[268] Although home rule ordinances potentially implicate all parents and tenants that reside in cities that have passed these ordinances, in practice, "the burden falls disproportionately on a select few."[269] Due to the demographics of parents and renters, as well as the manner in which home rule ordinances are enforced, the "select few" are often members of vulnerable groups.[270] The results of the Milwaukee study, for instance, suggest that nuisance ordinances are heavily inflected with issues of gender, class, and race.[271] The study authors found that "[p]roperties in black neighborhoods disproportionately received citations," and

266. A similar slippage occurs in the nuisance context. The ACLU lawyer representing Lakisha Briggs told the *New York Times:* "The problem with these ordinances is that they turn victims of crime who are pleading for emergency assistance into 'nuisances' in the eyes of the city." Liboiron, *supra*, note 264. One academic offers an insightful analysis of this quote, suggesting that it taps into a long-running historical vein that connects race with nuisance. As he notes, this "turn of phrase, whereby people—women, and usually black women—are *turned into both a form of pollution and a force that precludes the enjoyment of one's property*," is "part of a long historical trend." *Id.* (emphasis added).

267. Cari Fais, Note, *Denying Access to Justice: The Cost of Applying Chronic Nuisance Laws to Domestic Violence*, 108 COLUM. L. REV. 1181, 1181–82 (2008).

268. In legal scholarship, group-based ideas of vulnerability are often understood to be in conflict with "universality-based" ideas of vulnerability. "On the one hand, vulnerability is often used to analyze specific populations; on the other hand, Martha Fineman has developed a vulnerability thesis that is expressly universal in its scope and 'post-identity.'" Lourdes Peroni & Alexandra Timmer, *Vulnerable Groups: The Promise of An Emerging Concept in European Human Rights Convention Law*, 11 INT'L J. CONST. LAW 1056, 1060 (2013). Here, "vulnerable groups" is meant to convey the idea that certain identity-based groups have historically been subjected to discrimination, and that although "people are differently vulnerable," vulnerability is "partially constructed depending on economic, political, and social processes of inclusion and exclusion." *Id.*

269. Buerger, *supra* note 54, at 110. A significant portion of the population is parents or guardians, and over one hundred million tenants live in rental properties nationwide. "According to the U.S. Census Bureau's 2009 American Housing Survey (AHS), there are 38.6 million occupied rental properties in the United States, which more than 100 million tenants call home." Hawkins, *supra* note 14, at 66.

270. Rental housing often conjures up associations with "urban 'concrete jungles.'" In truth, though, "the majority of renters live outside city centers, in 'suburban or nonmetropolitan areas.'" Hawkins, *supra* note 14, at 66.

271. Desmond & Valdez, *supra* note 42, at 136–39.

those located in more integrated black neighborhoods had the highest likelihood of being deemed nuisances.[272] The empirics of the study were as follows: "[o]f the 503 properties deemed nuisances, 319 were located in black neighborhoods."[273] The next largest number, 152, came from mixed neighborhoods, but of these mixed-neighborhood properties, 124 deemed nuisances were in neighborhoods "in which the proportion of black residents exceeded that of white or Hispanic residents."[274] Only 18 properties were deemed nuisances in white neighborhoods and 14 properties were deemed nuisances in Hispanic neighborhoods.[275]

Nuisance laws also affect other vulnerable group members, particularly the poor and disabled.[276] The *New York Times* article setting out the case of Lakisha Briggs also included a brief vignette about William Zarnoth, a sixty-two year old Milwaukee bartender.[277] He was evicted after too many 911 calls arising from a dispute between his roommates and another tenant in the building.[278] The eviction record made it difficult for him to find another apartment, leaving him in an eighty-dollar-per-week room without cooking facilities.[279]

Parental liability ordinances also have their greatest impact on vulnerable groups, particularly single-parent households, most of which are headed by women.[280] Households with single mothers are more prevalent than households with two parents and households with single fathers—leaving single mothers as the persons most likely to be affected by parental liability ordinances.[281] In situations where "the father-figure leaves the household or was never part of it," the

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272. *Id*. at 117.

273. *Id*. at 125.

274. *Id.*

275. *Id*.

276. For an examination of the impact of the one-strike policy in federal public housing upon the disabled, see generally Anne C. Fleming, *Protecting the Innocent: The Future of Mentally Disabled Tenants in Federally Subsidized Housing After* HUD v. Rucker, 40 HARV. C.R.-C.L. L. REV. 197 (2005).

277. Eckholm, *supra* note 199.

278. *Id.*

279. *Id.*

280. *See* Dimitris, *supra* note 11, at 676 ("Opponents [of parental liability ordinances] argue that parental responsibility statutes impose fines and imprisonment on parents who already have problems controlling their child in large part due to their financial shortcomings and lack of being physically proximate to the child.").

281. *Id*. at 675.

mother will be the one subject to the ordinance because it is she, rather than the absent parent, who will be regarded as "failing to control" the child."[282] In fact, single motherhood itself is often associated with fault. It is commonly perceived as being associated with, or perhaps even causative of, juvenile delinquency.[283] It is "presented as having a devastating impact on the institution of the family in the first instance and the fate of society in the long run."[284]

Socioeconomic status also plays a significant role in bullying. Countries with the highest wealth disparity also have the highest bullying rates.[285] Further, although bullies can be found at every layer of social strata, they are slightly more likely to come from middle-to low income backgrounds.[286] Also, bullying ordinances may tend to have their largest impact upon racial minorities, as Carson City, California, recognized in its decision to not enact an antibullying parental liability ordinance.[287]

Also, although parental liability ordinances subject all parents to the potential for fines and other escalating legal sanctions, parents who rent may face the additional consequence of eviction under the crime-free program. Crime-free lease addendums link the burden of security with home ownership because only homeowners can rest assured that they will not be displaced if their friends or family members engage in unlawful activities.[288] Freedom from displacement becomes a perk of home ownership, whereas those who choose to rent or must rent for financial reasons are subject to a different set of interventions.

Often, socioeconomic, gender, and racial divides separate home renters from homeowners. Vulnerable groups like racial minorities,

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282. *Id.*

283. Fineman, *supra* note 157, at 960.

284. *Id.* at 959 (quoting Martha Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 287 (1991)).

285. Pernille Due et al., *Socioeconomic Inequality in Exposure to Bullying During Adolescence: A Comparative, Cross-Sectional, Multilevel Study in 35 Countries*, 99 AM. J. OF PUB. HEALTH 907, 913 (2009).

286. Neil Tippett & Dieter Wolke, *Socioeconomic Status and Bullying: A Meta-Analysis*, 104 AM. J. OF PUB. HEALTH 48, 48 (2014).

287. Part of the opposition to the bill was based in the idea that it could be used in a racially discriminatory manner, to "further criminalize Black and Brown youth." Muhammad, *supra* note 88.

288. Professor David Garland posits that there are increasing and "developing divisions between property-owning classes and those social groups who are deemed a threat to property." Garland, *supra* note 44, at 463. Home rule ordinances may be such a distinction.

women, and the disabled are more likely to live in rental housing, and are therefore most often subject to these ordinances.[289] For instance, in Illinois, where over one hundred municipalities have adopted crime-free programs, the percentage of "non-Hispanic white households" that rent is only 25%.[290] In contrast, "59.1% of African-American households, 47.4% of Hispanic households, and 38.3% of Asian households rent."[291] In terms of gender, "[f]emale-headed households are more than twice as likely to rent as the general population."[292] And, on a national basis, "41.8% of households with a nonelderly person with a disability rent, as compared to just 31.6% of households that rent overall."[293] These households are asked to shoulder the burden of preventing criminal activity in a way that members of other groups and homeowners are not. Ironically, these groups are also the least likely to have the resources available to engage in robust and successful third-party policing.

Some have argued that "[t]he poor (and perhaps particularly the working poor) frequently are seen as being at fault, and are found to be negligent or irresponsible if not wholly criminal in their actions."[294] There is arguably an element of this in some of the narratives surrounding home rule ordinances. For instance, there exists a curious slippage, or a sort of conflation, of the actual wrongdoer with the person held vicariously liable for that wrongdoing. Rather than portraying the parent or tenant as the means to an end (that end being deterrence), parents and tenants are themselves configured as wrongdoers in a way that connects to vulnerability. In *Rucker*, for example, after suggesting that deterrence and enforcement justifications supported the one-strike policy's strict-liability nature, the Court offered a final justification for the imposition of strict liability: "*Regardless of knowledge, a tenant who cannot control drug crime, or other criminal activities by a household member which*

289. WERTH, *supra* note 123, at 5. These populations were also the most affected by the precursor to the crime-free lease addendum, the one-strike policy in federal housing. Austin, *supra* note 11, at 275–76. For more discussion of the ways in which policies connected to the war on drugs particularly impact women, see generally Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER, RACE, & JUST. 277 (2002).

290. WERTH, *supra* note 123, at 5 n.13.

291. *Id.*

292. *Id.*

293. *Id.*

294. Tyler & Segady, *supra* note 11, at 89.

threaten health or safety of other residents, is a threat to other residents and the project."[295]

Thus, according to the Court, the tenant herself *is* at fault. She cannot control drug or other crime, and thus becomes a "threat" herself, endangering the security of the other tenants and the community at large.[296] Whereas earlier in the opinion the Court held that "control" merely meant "permitted access to the premises," when considering the strict-liability nature of the one-strike policy, the Court redefined "control" to mean the ability to govern or impose one's will upon others—and the lack of control was itself blameworthy.[297] In other words, it is the tenant's lack of control of others, her lack of power, or her *vulnerability* that renders her a threat to security.[298]

C. The Framing Effect

Vicarious liability also performs a powerful framing function for home rule ordinances. It suggests that the blame for criminal or drug-related behavior falls upon the individual wrongdoer and his or her social or familial others, to the exclusion of everything else. As with the dominant criminal law narrative, the focus in this narrative is very narrow. The criminal law tends to tell stories of "individuals, as opposed to complex systems and institutions,"[299] and explains crime as a "problem of individual criminal pathology."[300] It "obscures the economic and sociological conditions" connected to crime, and

295. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002) (emphasis added) (quotation mark omitted).

296. "Ultimately, according to *Rucker*, families who are unable or unwilling to control household members who engage in criminal activities threaten the health and safety of other residents in the development." Rodney, *supra* note 137, at 746. The court in *Dayton Metropolitan Housing Authority v. Kilgore*, 958 N.E.2d 187 (Ohio Ct. App. 2011), made a similar point. *Id.* at 190.

297. *Kilgore*, 958 N.E.2d at 189 (quoting *Rucker*, 535 U.S. at 131).

298. The disease metaphors that surround the social problems of bullying, drugs, and criminality also contribute to the idea of a shared blameworthiness. These "social ills" are described as "epidemic, pandemic, and contagious," and as "viral." Ahrens, *supra* note 160, at 1675, 1688. Those words make it easy to imagine members of the same household sharing the same affliction.

299. Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 468 (2006)

300. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 624 (2009).

thereby "relieves 'pressure on the government and society'" to address these underlying factors.[301]

Vicarious liability in the home rule ordinances widens this frame ever-so-slightly, so that a wrongdoer's social or familial others are also included in the picture. However, additional complex contributors remain invisible and outside the borders of this new framing. Social dynamics are erased and recast as "characteristics of individuals," and the larger, structural factors that are correlated with crime and drug abuse—like poverty, economic inequality, and lack of opportunities—are ignored in favor of a simpler tale, according to which the individual wrongdoer and his or her family are the entire problem, and that problem can be solved through displacement.[302]

IV. SANCTIONING NONCOMPLIANCE

This Part explores how the vicarious liability nature of home rule ordinances pulls not just primary wrongdoers into the orbit of criminalization, but also their familial or social relations. Part IV.A discusses how those familial or social others then become subject to the same kinds of stigma that often follow those actually convicted of crimes. Further, those familial or social others become subject to the legal sanctions provided for in the ordinances, such as fines and, more significantly, eviction. Part IV.B addresses the significant negative consequences associated with employing eviction as a remedy. Eviction is a difficult event for anyone, but for low-income tenants, it can be devastating. Indeed, the end result of eviction for low-income tenants is often homelessness. Imposing eviction—and the resultant homelessness—on those who are unable to prevent their intimate others from engaging in wrongful acts implies that their failure has rendered them unworthy of a home, and thereby creates a "home rule" regarding who can maintain stable housing.

A. Criminalization and Stigmatization

The crime-free lease addendums and nuisance ordinances technically make tenants "*civilly* liable for the alleged *criminal*

301. *Id.* (quotations marks omitted).

302. JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW 73 (2011) (quoting Renée Römkens, *Law as a Trojan Horse: Unintended Consequences of Rights-Based Interventions to Support Battered Women*, 13 YALE J.L. & FEMINISM 265, 285 (2001).

conduct" of others.[303] The parental liability ordinances go further and may make parents criminally liable for the alleged unlawful conduct of their children. All three ordinances have the same effect: tenants and parents are implicated in the criminality of those in their social circles and family groups. Crime thus becomes framed as a problem that results not just from individual pathology *but also from the failure of family and friends to prevent the behavior*. The ordinances "extend responsibility (and more importantly, liability) for 'community safety'" into the home and onto the shoulders of tenants and parents, and link the wrongful act with a failure of responsibility on their part.[304] Thus, through vicarious liability, social and familial relations become implicated in the wrongful act itself. Indeed, this is the very definition of vicarious liability: it imputes a wrongful act from one person to another, based on the relationship between them.[305] In the home rule ordinance narrative, then, individual wrongdoers as well as their social and familial relations are responsible for any unlawful acts.

Grouping primary wrongdoers with their familial or social others places all parties beneath the "criminal" umbrella, under which no one is "innocent."[306] Friends and family members often suffer "secondary stigma and ostracism" because of their relationship to those convicted of crimes.[307] Home rule ordinances magnify this stigma, lumping friends and family into the category of "criminal" despite a lack of individual wrongdoing (and even though the underlying bad act may not even have constituted a crime in the strict sense).[308] This is a significant event: "As Professor Alexandra Natapoff recently observed, for a person who has been publicly transformed from law-abiding citizen into criminal, a significant psycho-social line has been crossed."[309] Families become subject to "othering," a common practice of social control that systematically

303. Mele, *supra* note 11, at 124.

304. *Id*. at 129.

305. SAMAHA, *supra* note 9, at 229.

306. As one proponent of the crime-free lease addendum asserted, there "is no innocent resident." *Chaos to Calm with Crime Free Multi Housing*, CTR. FOR PROBLEM-ORIENTED POLICING, http://www.popcenter.org/library/awards/goldstein/2011/11-08.pdf (last visited Jan. 16, 2015).

307. Wayne A. Logan, *Informal Collateral Consequences*, 88 WASH. L. REV. 1103, 1108 (2013).

308. *See supra* text accompanying note 134.

309. *Id.* at 1112 (quotation marks omitted).

denies certain groups "full participation in civil society" and labels them with "pariah status."[310]

B. Eviction

Although the parental liability ordinances that specify fines as their attendant sanction are problematic, the stigmatizing and disenfranchising impact of the eviction sanction renders it an especially devastating event, particularly for low-income tenants.[311] Homes serve more than just a functional purpose. In addition to providing physical shelter, homes "can serve as a 'person's security, self-identity, and center for social interaction.' A home represents a family's safe haven, . . . 'a place of privacy and security.'"[312] Furthermore, "[i]n terms of self-identity, a home can reflect its occupant's sense of self. It provides space to develop and express an identity."[313] It provides a place to nurture oneself and others.[314] It is the site for most familial and many social interactions, a center for interacting with others. In essence, home is "a means for the physical and social location of a person, his private life and his social relationships."[315]

Given all the practical, psychic, and social attachments to home, it is not surprising that moving is commonly cited as the third most stressful life event, after death and divorce.[316] Eviction, or forced moving, is even more so, as it lacks the hope or upward mobility associated with most voluntary moves. Eviction is "a severely consequential and traumatic event. Researchers have linked eviction

310. Mele & Miller, *supra* note 183, at 22 (quotation marks omitted).

311. Fines can be very difficult for low-income families to pay. Such sanctions are "insidious in part because they often are assessed with little to no attention paid to the defendant's circumstances," and therefore, they often result in "severe consequences" for individuals and families. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 281 (2014).

312. Heinle, *supra* note 173, at 229.

313. *Id.* at 229 n.104 (quoting Megan J. Ballard, *Legal Protections for Home Dwellers: Caulking the Cracks to Preserve Occupancy*, 56 SYRACUSE L. REV. 277, 285 (2006)).

314. *Id.* at 229.

315. HCJ 7015/02 Ajuri v. IDF Commander [2002] (Isr.).

316. Jeff Wuorio, *Make Your Move Less Stressful*, USA TODAY (Jan. 17, 2014, 10:31 AM), http://www.usatoday.com/story/life/weekend/living/2014/01/17/make-your-move-less-stressful/4531323.

to homelessness, material hardship, increased residential mobility, job loss, depression, and even suicide."[317]

Although eviction is stressful for anyone, those with enough socioeconomic resources are usually able to find equivalent housing. For low-income tenants, however, "[t]he mark of eviction on one's record often prevents tenants from securing affordable housing in a decent neighborhood, and it disqualifies them from many housing programs."[318] Thus, "[f]or many, if not most, low-income tenants, eviction leads to immediate homelessness."[319] In part, this is because of the stigmatization associated with evictions:

> Evictions carry a stigma. Many landlords will not rent to persons who have been evicted, and an eviction can also ban a person from affordable housing programs. Tenants who are evicted often lose not only their homes but their possessions as well, stripping them of the few assets they had. Once evicted, tenants often find themselves forced to move from one undesirable location to another.[320]

Crime, mediated through the civil law, serves as the trigger that sets a household on this downward spiral.[321] Just as in the one-strike

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317. Desmond & Valdez, *supra* note 42, at 137. Eviction also has a significant negative impact upon children. It can lead to poorer school performance, increased truancy, and an increased risk of dropping-out. Matthew Desmond, Weihua An, Richelle Winkler & Thomas Feriss, *Evicting Children*, 92 SOC. FORCES 303, 303 (2013). Further, "increased residential mobility has also been linked to higher rates of adolescence violence and children's health risks." *Id.* These health risks are exacerbated when evictions force families to relocate to substandard homes. *Id.* Indeed, eviction also negatively impacts entire communities. It can "contribute to neighborhood disadvantage," "unravel the fabric of a community," and thwart "efforts to establish and maintain social capital, local cohesion and community investment. Eviction, then, can result in negative consequences, not only for children of evicted households, but also for *all* children who live in high-eviction neighborhoods." *Id.* (citations omitted).

318. *Id*. Gentrification is also hinted at in the eviction policies. "As a process, gentrification entails often-intentional displacement of poor residents, class conflict, and, at times, violence." Kaplan-Lyman, *supra* note 41, at 187. It has been suggested that the one-strike policy is performing similar work in Chicago. One study found that "the number of one-strike cases across the city increased sharply in CHA developments where demolition was eminent," and also rose dramatically in the mixed-income units created to replace those housing units. Caputo, *supra* note 221. As one community organizer stated, "These policies are intended to push people out." *Id.*

319. Levy, *supra* note 12, at 564.

320. Matthew Desmond, *Poor Black Women are Evicted at Alarming Rates, Setting Off a Chain of Hardship*, MACARTHUR FOUND. 2 (Mar. 2014) http://www.macfound.org/media/files/HHM_Research_Brief_-_Poor_Black_Women_Are_Evicted_at_Alarming_Rates.pdf.

321. Indeed, even things that are only "crimelike" serve as triggers. One Las Vegas landlord describes what triggered a family's eviction in her building: "Because of our Block Watch efforts, we helped police find a juvenile who was shooting an air gun in the neighborhood. . . . Within a couple of days a suspect was apprehended by police from information received from

policy context, the ability or inability to control crime has become an "an unacknowledged way" of determining who is or is not worthy of having a home.[322] Home rule ordinances serve as a sorting tool, but one that only applies to certain portions of the population. This raises questions of "equity across economic class lines," for while a renting family subject to a crime-free lease addendum might find itself homeless following one member's "simple possession or use of a small quantity of cocaine," for a home-owning middle-class family, that same offense might result only in judicially mandated drug treatment.[323]

Despite the significance of eviction, and the fact that it is often a precursor to homelessness for low-income tenants, courts have held that eviction is not technically a "punishment."[324] For civil crime-free and nuisance ordinances to be considered "punishment," the test is "'whether the statutory scheme was so punitive either in purpose or effect . . . as to transform what was clearly intended as a civil remedy

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Stanford Court's Block Watchers. The Crime Free Lease Addendum was used to evict the family from the community." *Crime Free Multi-Housing Program: Landlord Training Manual*, LAS VEGAS METRO. POLICE DEP'T, http://www.lvmpd.com/ProtectYourself/CrimeFreeMultiHousing/tabid/110/default.aspx (last visited Jan. 16, 2015).

322. SIMON, *supra* note 49, at 196.

323. Weil, *supra* note 11, at 177, 178. Not surprisingly given the demographic of renters and those affected by home rule ordinances,

> [t]he most common family composition in the homeless population is a female with a child or children. Forty percent of the homeless population is made up of families with children. Of those families, eighty-four percent are female-headed. Families of color are particularly likely to be homeless, and more than fifty percent of the homeless population is African American or Latino. This population is demographically similar to the population living in subsidized housing, although an even greater percentage of those living in subsidized housing are families with children.

Madeline Howard, Note, *Subsidized Housing Policy: Defining the Family*, 22 BERKELEY J. GENDER L. & JUST. 97, 103 (2007) (footnotes omitted).

324. Levy, *supra* note 12, at 558 n.121 (citing City of New York v. Wright, 618 N.Y.S.2d 938, 939 (N.Y. App. Term 1994)). The dissent at the intermediate appellate level in *Rucker* made a similar observation:

> [E]victions in these circumstances are not punitive. They are remedial. A civil sanction is punitive when it serves "either retributive or deterrent purposes." Eviction serves the classic purpose of a contractual remedy—it returns the parties to "as good a position as that occupied . . . before the contract was made." The remedy of eviction alone is not punitive.

Rucker v. Davis, 237 F.3d 1113, 1141 (9th Cir. 2001), *rev'd*, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (citations omitted). The fact that the city often requires landlords to evict on the basis of crime-free lease addendums could, however, change this analysis. *See infra* note 334.

into a criminal penalty.'"[325] Whether a sanction can be classified as a "punishment" has significant legal consequences, but "[s]uch legal distinctions . . . likely mean very little" to those upon whom the sanctions are visited.[326] For example, to "a mother who loses her apartment due to the actions of her son . . . eviction feels clearly punitive."[327] Paying attention to those who, like the mother referenced above, are "at the receiving end of these exercises of state power" reminds us that the "blurring of boundaries" between civil regulation and criminal punishment is not merely a problem of conceptual incoherence for legal scholars, but also one of perceptual legitimacy for those subject to such sanctions.[328]

V. CHALLENGING HOME RULE ORDINANCES AND CREATING NEW POSSIBILITIES

Some of "those who are at the receiving end of these exercises of state power" have begun challenging home rule ordinances in the courts.[329] Part V.A offers a brief outline of the emerging legal landscape challenging home rule ordinances. Part V.B examines the shortcomings of the evidence supporting home rule ordinances, and suggests alternative approaches the municipalities could consider instead. These alternative approaches arguably both better target the social problems motivating the home rules ordinances, and avoid the negative impacts that the ordinances impose.

A. Challenging Home Rules

Advocates have launched three main avenues of challenge. The first line of argument is that home rule ordinances exceed the bounds of the home rule authority grant. The second major basis for challenging these laws is that they conflict with state laws. The third ground is that the ordinances violate federal or state constitutions, or other remedial statutes. In this regard, advocates have had some

325. Levy, *supra* note 12, at 558 n.121 (quoting Hudson v. United States, 522 U.S. 93, 100 (1997)).

326. *Id.*

327. *Id*. The eviction policies bear an uncanny resemblance to the "move along" policies initially employed to force undesirables out of public spaces. Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 372 (2001).

328. Austin Sarat, Lawrence Douglas & Martha Merill Umphrey, *On the Blurred Boundary Between Regulation and Punishment*, *in* LAW AS PUNISHMENT / LAW AS REGULATION, *supra* note 77, at 1, 7.

329. *Id*.

success arguing that parental liability ordinances violate substantive due process, crime-free ordinances violate procedural due process, and nuisance ordinances violate both due process and the First Amendment.

1. *Exceeds Grant of Home Rule Authority*. Because home rule ordinances usually rely upon the grant of home rule authority for their existence, they are vulnerable to arguments that they exceed the bounds of that authority. For example, in Cedar Rapids, Iowa, a group of landlords successfully challenged a mandated crime-free lease addendum.[330] Landlords, like evicted tenants, are often unhappy with these ordinances for a variety of reasons. First, landlords must invest both time and money when evicting tenants: the process can be long and legal expenses can total in the hundreds or thousands.[331] Second, the landlord must serve as a de facto "criminal prosecutor" in proceedings in which they bear the burden of proving, on a balance of probabilities, that the "tenant or tenant's guest performed a criminal act."[332] This role requires a significant amount of legwork, including gathering evidence like witness testimony, records, and documents.[333] More fundamentally, landlords may resent having to perform these activities and evict people whom, either as a matter of business judgment or for personal reasons, they do not wish to evict.[334]

330. Landlords of Linn Cnty. v. City of Cedar Rapids, Iowa, No. EQCV069920, *available at* http://landlordsoflinncounty.org/wp-content/uploads/downloads/2011/07/Chapter-29-Ruling-7-6-11.pdf.

331. Editorial, *Landlord-Tenant Ordinance Fails the Test*, GAZETTE (Apr. 3, 2014, 3:09 PM), http://thegazette.com/2011/07/16/landlord-tenant-ordinance-fails-the-test. Indeed, because crime-free lease addendums (and nuisance ordinances) increase a landlord's cost of doing business, they may result in reducing low-income rental housing. Letter from Katherine E. Walz, Jeremy Bergstrom & Emily Werth, Sargent Shriver Nat'l Ctr. on Poverty Law to Rockford City Council (Jan. 15, 2013), *available at* http://povertylaw.org/sites/default/files/webfiles/Letter%20to%20Belleville%20City%20Council%20on%20Crime%20Free%20Housing%20Ordinance.pdf.

332. Richard Magnone, *Crime Free Addendums in Illinois*, CHICAGOEVICTION.COM (July 7, 2011), http://chicagoeviction.com/2011/07/crime-free-addendums-in-illinois.

333. *Id.*

334. Indeed, while the one-strike policy allowed housing authorities to evict tenants who failed to prevent the wrongful actions of others, it did not require that they do so. Housing authorities were free to use the "innocent tenant" defense if they felt it appropriate. Rachel Hannaford, Comment, *Trading Due Process Rights for Shelter:* Rucker *and Unconstitutional Conditions in Public Housing Leases*, 6 U. PA. J. CONST. L. 139, 140 (2003). In contrast, cities often require private landlords to evict on the basis of crime-free lease addendum violations, or face a series of escalating sanctions.

The Cedar Rapids landlord association, a nonprofit corporation, alleged that the ordinance mandating crime-free lease addendums violated the city's home rule powers. The home rule grant at issue gave cities a broad power to "exercise any power and perform any function . . . appropriate to protect and preserve the rights, privileges, and property" of the city and "to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents," but explicitly excluded "the power to "enact private or civil law governing civil relationships."[335] The association argued that the ordinance fell within the exclusion, and the court agreed. The judge held that this sort of limitation to the freedom of contract between a landlord and a tenant was indeed an attempt to "enact private or civil law governing civil relationships."[336]

2. *Conflicts with State Law*. In addition to the finding that the city ordinance exceeded home rule authority, the court in *Landlords of Linn County v. City of Cedar Rapids* also held that the ordinance was in conflict with the Iowa law setting out grounds for eviction.[337] The state law provided that "clear and present danger presented by a tenant" was a basis for eviction.[338] The court found that the city's expansion of this standard to encompass "all criminal law violations, including simple misdemeanors," and to include not only a tenant's own violations, but also those committed by guests, even without the tenant's knowledge, "was not reconcilable" with this state standard.[339]

335. IOWA CODE ANN. § 364.1 (West 1999 & Supp. 2014). Over one hundred years ago, American cities were granted home rule authority. This authority allows them "to legislate on a broad range of social and economic policies without prior state legislative approval." Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1100 (2012). The range of acceptable legislative areas typically includes those of "local" or "municipal" concern, and often excludes certain areas like taxing and spending powers, or areas of private or civil law. DAVID J. MCCARTHY, JR. & LAURIE REYNOLDS, LOCAL GOVERNMENT LAW IN A NUTSHELL 26 (5th ed. 2003).

336. Landlords of Linn Cnty. v. City of Cedar Rapids, Iowa, No. EQCV069920, *available at* http://landlordsoflinncounty.org/wp-content/uploads/downloads/2011/07/Chapter-29-Ruling-7-6-11.pdf. Although the contractual nature of the relationship in this instance rendered the eviction policy void, the contractual nature of the landlord–tenant relationship led to the opposite result in *Rucker*, 535 U.S. 125 (2002). There, the Supreme Court held that because the government was acting as a landlord, and the basis for eviction was a contractual violation, as a matter of the private law between landlord and tenant, a strict-liability standard was acceptable. *Id.* at 136.

337. *Landlords of Linn Cnty.*, No. EQCV069920, at 3.

338. *Id.*

339. *Id*.

Crime-free lease addendums have caused similar state–city tension in Wisconsin. At one point, Wisconsin rejected the possibility of cities mandating crime-free lease addendums based in strict liability and created a statutory ban that voids such lease terms.[340] Under that statute, tenants could not be evicted on a vicarious liability standard for criminal activity on or near the premises.[341]

A parental liability ordinance in a suburb of Cleveland, Ohio, was also recently struck down on the grounds that it conflicted with a state law.[342] The ordinance did "not require a showing that the parent specifically knew about or contributed to the child's violation or criminal wrong," and provided that a third offense could result in a 180-day jail term for the violating parent.[343] Under the ordinance, parents could raise the defense that they had taken reasonable steps to control the child, but the Ohio Court of Appeals held that this was not enough to reconcile the ordinance with a state statute that required there to be an underlying "act or omission as a predicate for culpability."[344]

3. *Constitutional and Other Concerns.* Municipal parental liability ordinances have also been challenged on another basis: substantive due process. In *State v. Akers*, a statute was found to be invalid for similar reasons to the Ohio suburb ordinance: it "did not

340. S.B. 466, Wisconsin Landlord Omnibus Bill, § 704.44 (9) (Wis. 2011). *See* Tim Ballering, *WI Landlord Omnibus Bill, Leases and Criminal Activity*, JUST A LANDLORD (Mar. 23, 2012), http://justalandlord.com. Initially, the statute provided that "a residential rental agreement is void and unenforceable if it does any of the following . . . allows the landlord to terminate the tenancy of a tenant if a crime is committed in or on the rental property, even if the tenant could not reasonably have prevented this crime." *Id.* This was later modified to void lease terms that "[a]llow[] the landlord to terminate the tenancy of a tenant based solely on the commission of a crime in or on the rental property if the tenant, or someone who lawfully resides with the tenant, is the victim . . . of that crime." *See* Tim Ballering, *The New Wisconsin Landlord Tenant Law, Criminal Activity and Leases*, JUST A LANDLORD (Oct. 22, 2013), http://justalandlord.com/2012/03/23/wi-landlord-omnibus-bill-leases-and-criminal-activity.

341. *Id.*

342. Maple Heights v Ephraim, No. 90237, slip op. (Ohio Ct. App. Sept. 11, 2008).

343. *See* Collins et al., *supra* note 15, at 1340.

344. *Id.* It should also be remembered that parents of children who are bullied might have an available remedy in tort law. For instance, in the Georgia-based case of *Boston v. Athearn*, 764 S.E.2d 582 (Ga. Ct. App. 2014), parents of a seventh-grader whose classmate created a fake Facebook page about her brought an action against the classmate and his parents. In Georgia, parents can be liable for negligence when they "fail[] to exercise reasonable care to prevent a child under his control from creating an unreasonable risk of harm to third persons, where he has knowledge of facts from which [they] should reasonably anticipate that harm will otherwise result." *Id.* at 586 n.5 (quoting Assurance Co. of Am. v. Bell, 134 S.E.2d 540, 541 (Ga. Ct. App. 1963) (quotation marks omitted)).

impose liability on the basis of any act or omission committed by a parent but instead imposed liability solely because of an individual's status as a parent," and was therefore found to have "violated the due process clause of the state constitution."[345] A parental liability ordinance in Trenton, New Jersey, was also struck down on substantive due-process grounds. There, the court noted that rather than being an "overriding cause of juvenile misconduct," parental influence was simply one factor in a constellation of factors leading to such behavior.[346] However, in *Williams v. Garcetti*,[347] the court rejected an argument that a similar state parental responsibility law violated due process.[348]

Although there is certainly an argument to be made that crime-free lease ordinances violate substantive due process,[349] most of the successful challenges have sounded in procedural due process. In one case, *Javinsky-Wenzek v. City of St. Louis Park*,[350] two landlords who were ordered by the city to terminate a tenancy when a small amount of marijuana was discovered on the premises brought a Section 1983 action against the City.[351] In a proceeding seeking a preliminary injunction against the municipality, the court found that the landlords were "likely to prove that the City violated their procedural due process rights," but were not likely to prove the substantive due process claim. The court concluded that the ordinance in question "did not appear sufficiently irrational or outrageous to violate

345. *See* MARKEL ET AL., *supra* note 110, at 68

346. Doe v. City of Trenton, 362 A.2d 1200 (N.J. Super. Ct. App. Div. 1967). The court also noted that, "[w]hile Euripides reminds us that the gods often visit the iniquities of the fathers upon the children, we are not yet prepared to say that the converse ought to be so." *Id.* at 1203..

347. Williams v. Garcetti, 853 P.2d 507 (Cal. 1993).

348. *Id.* at 577.

349. Privacy and autonomy rights may be implicated, as "[t]he right of an individual to conduct intimate relationships in the intimacy of his or her own home seems . . . to be the heart of the Constitution's protection of privacy." Bowers v. Hardwick, 478 U.S. 186, 208 (1996) (Blackmun J., dissenting), *quoted in* Heidi Reamer Anderson, *Plotting Privacy as Intimacy*, 46 IND. L. REV. 311, 311 (2013). Also, "the Supreme Court has enshrined several family-oriented rights in its jurisprudence, including rights to determine when and where to bear a child; rights to the care, custody, and control of one's children; and the right to marry the person of one's choice." Kerry Abrams, *What Makes the Family Special*, 80 U. CHI. L. REV. 7, 23 (2013).

350. Javinksy-Wenzek v. City of St. Louis Park, 829 F. Supp. 2d 787 (D. Minn. 2011).

351. The marijuana was discovered during a search of the tenant's home, which was conducted after their adult son, who was "not on the lease and allegedly did not reside at the property . . . purportedly stole a number of items from a drug dealer, including drugs." *Id.* at 790.

substantive due process," and that the ruling in *Rucker* likely would stand as a rational basis for it.[352]

Procedural due process has also successfully been raised against nuisance ordinances. In *Cook v. City of Buena Park*,[353] the court held that a nuisance ordinance violated procedural due process.[354] There, the city had ordered a landlord to evict all the occupants of a rental unit after a tenant's roommate had been cited for "possession of drug paraphernalia."[355] The roommate successfully completed a drug-treatment program, which resulted in no criminal conviction, but the city nevertheless wished to proceed with an eviction.[356] The court found that the ordinance at issue was constitutionally infirm because "the notice requiring the landlord to institute unlawful detainer proceedings provided insufficient information to prosecute the action," "the 10-day period was inadequate for the landlord to garner evidence to support its eviction action," and "the ordinance required the landlord to prevail in the eviction action or face fines, penalties, a lien on his or her property, and even misdemeanor punishment."[357]

352. *Id.* at 796. The argument that the one-strike policy "violates the substantive due process norm of individual guilt, which is fundamental to our concept of justice, and deeply embedded in our nation's history and traditions" was rejected in *Rucker*. *See* Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Northern California, in Support of Respondents at 3, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (Nos. 00-1770, 00-1781), 2001 WL 1699135, at *7.

353. Cook v. City of Buena Park, 23 Cal. Rprtr. 3d 700 (Cal. Ct. App. 2005).

354. *Id.* at 701.

355. *Id.*

356. *Id.*

357. *But see* City of Peoria v. Danz, 2011 Ill. App. LEXIS 100819, at *1 (upholding a differently worded nuisance ordinance). In the nuisance context, it has been noted that cities have been attempting to indirectly accomplish through landlords what due process precludes them from doing directly. For instance, as attorney Sara Rose noted in the Lakisha Briggs case, "It was clear even to Norristown that a government entity cannot unilaterally kick someone out of their home without due process . . . so instead, they are trying to kick people out of their homes without due process by penalizing landlords if they don't evict." Anna Stolley Persky, *Ordinance That Evicts Tenants for Seeking Police Aid Is Putting Abused Women out on the Street*, A.B.A. J. (Sept. 1, 2013, 8:50 AM), http://www.abajournal.com/magazine/article/ordinance_that_evicts_tenants_for_seeking_police_aid_is_putting_abused_wome. Indeed, in the accompanying legal proceedings, the city acknowledged that the evictions would be unconstitutional if they attempted to do them directly. Debra Cassens Weiss, *Do Laws That Encourage Eviction for Repeated 911 Calls Violate First Amendment? ACLU Presses Case*, A.B.A. J. (Sep. 19, 2013, 1:26 PM), http://www.abajournal.com/news/article/do_laws_that_encourage_eviction_for_repeated_911_calls_violate_first_amendm. The ordinances thus appear to provide cities with a way "to exploit the apparently 'private' sphere in order to engage in unquestionably illegal activity," a phenomenon that has been identified in the rendition context at the international level, and appears to be repeating here at the smaller, local level, as well.

A concurring judge in *Cook v. Buena Park* suggested that the ordinance might also violate substantive due process. The judge noted that in addition to the procedural due-process claim, there were "other, more fundamental" constitutional concerns, including the ordinance's "sweeping requirement that all occupants of the premises must be evicted for the sins of one," the "disparate treatment of property owners and renters" (particularly since the court's "record reflect[ed] no nuisance abatement efforts against the owners of property for similar crimes"), and the "Damoclean substantive due process issue" looming "over this statutory scheme."[358]

In addition to the due-process concerns identified in *Cook v. Buena Park*, nuisance ordinances have also attracted challenges on other constitutional grounds related to domestic violence.[359] In East Rochester, New York, two female victims of domestic violence sued the city on the basis that the nuisance ordinance stopped them from calling police for assistance, out of fear of being evicted.[360] The impugned ordinance required landlords to evict tenants if there were three calls to police requesting assistance at the premises within twelve months, and explicitly included calls made for domestic violence, with no exception made for calls initiated by the person victimized by the behavior.[361] The plaintiffs claimed that their First Amendment "right to petition for a redress of grievances" was violated, and the suits were settled with a one hundred thousand dollar payment and a change to the ordinances.[362]

The case that the ACLU brought against Norristown, Pennsylvania, on behalf of evicted tenant Lakisha Briggs, also resulted in a settlement. Like the plaintiffs in East Rochester, the ACLU argued that the ordinances violated Lakisha Briggs's due-process rights and her First Amendment "right to petition for a

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Fiona de Londras, *Privatized Sovereign Performance: Regulating in the 'Gap' Between Security and Rights?*, 38 J.L. & SOC'Y 96, 97 (2011).

358. Cook v. City of Buena Park, 126 Cal. App. 4th 1, 23 (Cal. Ct. App. 2005) (Besworth, J., concurring). "Damoclean" is a reference to a figure in Greek mythology. Damocles was forced to sit with a sword suspended above his head, held only by one hair.

359. Both landlords and tenants have potential claims against nuisance ordinances. Landlords may argue that the "threats of fines, property seizure, and jail time" imposed by the ordinances violate the Fourth Amendment. Desmond & Valdez, *supra* note 42, at 138.

360. Persky, *supra* note 357.

361. Second Amended Complaint at 1, Grape v. Town/Village of East Rochester, No. 07 CV 6075 CJS (F), *available at* http://www.nhlp.org/files/Grape%20WDNY%20nuisance%202d%20compl.pdf (last visited Jan. 16, 2015).

362. Persky, *supra* note 357.

redress of grievances."[363] The case settled for $495,000, the repeal of the offending ordinances, and a promise not to enact a similar law in the future.[364]

This advocacy led to the repeal of nuisance ordinances in additional Pennsylvania cities, such as Mount Oliver and Forest City.[365] Indeed, raising awareness of this issue ultimately led to a statewide law in Pennsylvania. Like laws prohibiting landlords from evicting tenants for reasons related to domestic violence that have been enacted in California, Colorado, Minnesota, Wisconsin, Washington, and New Mexico,[366] the Pennsylvania law provides "protection for any resident, tenant, or landlord who faces penalty under a local ordinance because police or emergency services were called or responded to a situation where intervention was needed in response to abuse, crime, or an emergency."[367] This state law also "authorizes residents and landlords to seek remedies in court against any municipality that violates these protections."[368]

The Norristown case also attracted action at the federal level. The federal government brought a complaint against Norristown, alleging that the city's nuisance ordinance violated the Fair Housing Act "by discriminating against domestic violence survivors, the vast majority of whom are women."[369] The complaint resulted in a conciliation agreement "that requires training and ongoing monitoring of Norristown's activities."[370]

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363. *Id*.

364. Michaela Wallin, *Victims of Crime No Longer Have to Fear Calling 911 in Pennsylvania*, ACLU (Nov. 3, 2014), https://www.aclu.org/blog/womens-rights/victims-crime-no-longer-have-fear-calling-911-pennsylvania.

365. *Id.*

366. Justin Henry Lubas, *The Lack of Protection Available to Victims of Domestic Violence in Private Housing*, 13–18 (Seton Hall Law eRepository, Student Scholarship, Paper No. 264, 2013). New York is also poised to pass a similar law. Wallin, *supra* note 364.

367. Wallin, *supra* note 364.

368. *Id.*

369. *Id.*

370. *Id.* The Violence Against Women Act (VAWA) may also provide an avenue of challenge. It forbids "evicting tenants from federal housing for lease violations or criminal activity related to domestic abuse," and some state and local laws have extended this protection to private housing as well. Desmond & Valdez, *supra* note 42, at 139. Consistent with VAWA, the statute authorizing the use of the one-strike policy contains an exception for domestic violence victims. After the *Rucker* decision, the statute was amended to provide protections to domestic violence victims. However, a lease can nevertheless be terminated if "the domestic violence poses an actual or imminent threat to others." Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of*

Given these successes on the state and federal level, it seems likely that the use of carve-outs for domestic violence in nuisance and crime-free ordinances will increase.[371] The question then becomes whether this carve-out will end up strengthening or weakening the remaining home rules edifice.[372] Although there is a possibility that any domestic-violence exclusions could ironically serve to strengthen home rules, the increasing public awareness about these ordinances and the associated problems could ultimately lead to their disuse and demise.[373] Despite the domestic-violence exclusion in the nuisance and crime-free ordinance context, the many problems with home rule ordinances in general remain, including their reliance on vicarious liability standards that offend notions of fundamental justice, their distributional impact on vulnerable populations, and their overall destabilizing and disruptive impact on families.[374] Some courts have begun to denounce these ordinances, and as the public becomes more aware of them and begins to understand that they are "not an easy panacea for local problems but rather are fundamentally problematic

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Poverty Law in the Law School Curriculum, 35 WM. MITCHELL L. REV. 1057, 1074 n.86 (2009) (citing 42 U.S.C. § 1437d(t)(6)(A)–(E) (2012)).

371. Although only four of the municipalities examined in the Milwaukee study excluded domestic violence from the list of qualifying nuisance activities (Chicago, Madison, Phillipsburg, and the Village of East Rochester), and thirty-nine ordinances included "assault, sexual abuse, battery, or domestic violence among their list of nuisance activities," the advocacy successes on this front will likely result in a shift in these numbers. Desmond & Valdez, *supra* note 144, at 3.

372. A domestic-violence exclusion is obviously a positive step towards mitigating the impact of these ordinances on victims of domestic violence, but it is not a perfect one. Emily Werth notes that,

> [b]ecause of the complex ways in which domestic abuse plays out, many cases involving victims remain likely to fall through the cracks of such protective language. E.g., often when a victim of abuse calls for police help, her abuser gets arrested for crimes that are not self-evidently related to domestic violence or the victim herself even winds up being arrested; the protections incorporated in ordinances usually do not account for these realities. Victims whose immediate focus is on safety for themselves and their children may not be able to take advantage of protective language even if it clearly would apply to their situation.

Emily Werth, *Stemming the Tide of Crime-Free Rental Housing and Nuisance-Property Ordinances*, 47 J. POVERTY L. & POL'Y 349, 350 n.5 (2014).

373. Several advocacy groups, including the ACLU and the Shriver Center, have "launched a national campaign called I am Not a Nuisance, aimed at raising awareness of the collateral damage caused by such ordinances and pressuring more states and municipalities to add additional protections for [domestic violence] victims." Rebecca Burns, *Under Local Laws, 911 Calls Turn Domestic Abuse Victims into 'Nuisances*,' AL JAZEERA AM. (Dec. 8, 2014, 5:00 AM), http://america.aljazeera.com/articles/2014/12/8/nuisance-ordinancesdomesticviolencevictims.html. Also, public awareness recently played a role in defeating an antibullying parental liability ordinance in Carson City, California. *See* Muhammad, *supra* note 88.

374. For an argument that the Fair Housing Act preempts crime-free and nuisance ordinances, see Wroe, *supra* note 16.

policies that can generate a host of harmful effects" for tenants, families, and communities, municipalities may start turning away from home rule ordinances and towards alternative methods of addressing social problems.[375]

B. Creating New Possibilities

1. *Questioning the Efficacy of Home Rules.* Municipalities should ask two questions when considering home rule ordinances: "'are these policies just' and 'will they work.'"[376] Ideally, the answer to both questions should be yes, but in the case of the home rule ordinances, the answer to both is arguably no. In any event, the fact that home rule ordinances are at least questionable in the first category means that they stand "in need of substantial justification" and the "will they work" question thus assumes special importance.[377] Unfortunately, there is a dearth of information as to the effectiveness of home rule ordinances. Although some anecdotal evidence exists, the kind of sustained scientific studies that ideally anchor new laws and policies have not yet been conducted.[378]

In regard to parental liability laws, the lack of research means that it is virtually "impossible to speak about whether they are a good tool or not."[379] No reliable research assessing the efficacy of parental liability statutes has been conducted, so we simply do not know much about their impact.[380] We do, however, know that there is a link between poor parenting and juvenile misconduct. One study found that a "lack of parental supervision, parental rejection and parent-child involvement, [were] among the most powerful predictors of juvenile conduct problems and delinquency."[381] However, other

375. Werth, *supra* note 372, at 25.

376. Garnett, *supra* note 57, at 1112.

377. *See* MARKEL ET AL., *supra* note 110, at xiii.

378. This is part of a troubling trend in governance. As Garland notes, "there is now a recurring gap between research-based policy advice and the political action which ensues." Garland, *supra* note 44, at 462. A similar gap between policy and empirics can be seen in the broken-windows policing literature. *See* BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING 8 (2001) (discussing the fact that "the famous broken windows theory has never been verified").

379. Patchin, *supra* note 249.

380. *Id.*

381. Ralph Loeber & Magda Stouthamer-Loeber, *Family Factors as Correlates and Predictors of Juvenile Conduct Problems and Delinquency*, *in* 7 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 29–149 (M.H. Tonry & N. Morris eds., 1986) (quotation mark omitted).

powerful predictors that do not involve parenting have also been identified. A "high cost of living, poor standards of education, inadequate recreation, and slums," as well as peer groups, have also been acknowledged as powerful predictors of problematic youth behavior.[382] There is no compelling evidence that choosing to target parenting instead of these other contributing factors will resolve the issue of youth misconduct. Nor is there evidence that punishing parents is an effective means of improving parenting skills.[383]

Anecdotally, though, Silverton, Oregon, has claimed that after enacting its parental liability law, the town "experienced a 44.5-percent reduction in juvenile crime and reduced levels of truancy."[384] On the other hand, an older U.S. Department of Health, Education and Welfare study comparing the juvenile crime rate in sixteen states with civil parental liability laws against the crime rate in states without them found that the juvenile crime rate in those sixteen states was "slightly higher than the national average."[385] Without a definitive empirical study supporting the proposition that parental liability laws decrease youth crime, dueling anecdotal evidence does not seem to justify the imposition of parental liability ordinances.[386]

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382. Weil, *supra* note 11, at 181.

383. JOHN HOWARD SOC'Y OF ALTA., *supra* note 96. "'We find no evidence that punishing parents has any effect whatsoever on the curbing of juvenile delinquency . . . . Imprisonment means breaking up the family; fining means depriving the child and family of sustenance.'" Gilbert Geis & Arnold Binder, *Sins of Their Children: Parental Responsibility for Juvenile Delinquency*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 303, 319 (1991) (alteration in original) (quoting Paul Alexander, *Tort Responsibility of Parents and Teachers for Damage Caused by Children*, 16 U. TORONTO L.J. 165 (1965)). Judge Alexander presided over more than a thousand cases of contributing to juvenile delinquency in the 1930s and 1940s. *Id.*

384. *Parental Responsibility Laws*, JUVENILE JUSTICE REFORM INITIATIVES IN THE STATES 1994-1996, http://www.ojjdp.gov/pubs/reform/ch2_d.html (last visited Jan. 16, 2015).

385. *Id.* (citing Toni Weinstein, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Responsibility Statutes*, 64 S. CAL. L. REV. 863, 878 (1991).

386. *See id.* Interestingly, one study of juveniles in detention centers focused on how those juveniles perceived parental responsibility. Eve M. Brank & Jodi Lane, *Punishing My Parents: Juveniles' Perspectives on Parental Responsibility*, 19 CRIM. JUST. POL'Y REV. 333, 333–34 (2008). The demographics of the study suggest who is most likely to be impacted by parental liability ordinances: the sample of 147 children "was mostly African American (44%)," and "prior to living at the juvenile facility, 50.3% lived with their mother as the only parental figure." *Id.* at 338–39. The next largest category was Caucasian (35%), followed by "Hispanic (not Cuban) at 8%," and biracial or multiracial kids at 7%. *Id.* at 338. 20.4% lived with both parents, and 6.8% lived with just their fathers. *Id.* at 339. The youths were asked "how responsible do you think your parent(s) were for your activities that led to the arrest" and 75.5% responded with "not at all responsible." *Id.* at 342. However, 87.8% said that they would have been "less likely" to commit a crime if they knew that their parent(s) "would also be punished" for it. *Id.*

The efficacy of crime-free lease addendums and nuisance ordinances suffers from a similar lack of knowledge. First, it should be noted that proponents of crime-free housing ordinances often justify them on the basis that they are an appropriate response to the pressing social problem of high-crime rates in rental housing. However, these ordinances are sometimes passed as a means of crime prevention, rather than crime reduction, meaning that they are enacted in communities where crime is a rare occurrence. Instead, these communities enact these laws using the specter of a potential crime problem that could arise in the absence of these laws. For instance, Orland Park, a suburb of Chicago that enjoys a very low crime rate, recently adopted a crime-free ordinance. The mayor explained the reasons for its enactment: "It's not so much that there's major problems, but there are some problems, and we want to avoid problems in the future."[387] One landlord expressed skepticism that the purpose of the ordinance was at all connected to crime, pointing out that Orland Park's particular ordinance "defines room sizes and how many beds are allowed per room. 'There are things in there that I don't think are relative to being crime-free,' she said. 'I mean, how much crime do we really have in Orland Park?'"[388] Further, although Orland Park specifically acknowledged that crime was not a pressing social problem for its community, it should be noted that many cities claiming to suffer from heavy crime associated with rental housing rarely offer any statistics regarding the amount of crime on rental properties versus owner-occupied properties.[389]

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387. Carmen Greco Jr., *Orland Park Ordinance Requires Eviction of Troublesome Tenants*, CHI. TRIB., Jan. 23, 2009, http://articles.chicagotribune.com/2009-01-23/news/0901210789_1_ordinance-landlords-problem-tenants.

388. *Id.*

389. For example, in Belleville, Illinois, "the program was implemented to help reduce crime in rental housing," but "figures for criminal incidents in rental property were not immediately available." Jacqueline Lee, *How is the Belleville Crime-Free Program Doing?* BELLEVILLE NEWS, Jan. 28, 2014, http://www.bnd.com/so14/01/29/3029378/committee-will-meet-to-evaluate.html. Once the program started, there were 260 rental incidents in a two-month period, "ranging from loud music to marijuana possession to failure to register as a sex offender," and of those incidents, "12 resulted in evictions." *Id.* An article on Orland Park had a similar combination of a belief in high-crime rates for rental housing along with a lack of actual evidence to support that claim. Greco, *supra* note 387. The article describes how city "[o]fficials say crimes such as drug offenses, domestic disturbances and weapons violations come mainly from the village's 2,100 rental properties, although the village did not cite statistics." *Id.* Similarly, the United Kingdom has "made tackling anti-social behavior a priority," even though "the actual evidence from the Survey of English Housing and the British Crime Survey about the extent to which vandalism, graffiti, nuisance neighbours and teenagers 'hanging around' have become more serious problems in neighborhoods over the past 10 years is inconclusive."

Nevertheless, at least some communities do seem to experience higher crime rates associated with rental properties. Unfortunately, it is difficult to assess whether crime-free and nuisance ordinances help to reduce the crime associated with these residential units.[390] Although some anecdotal evidence exists, it suffers from two significant flaws. First, the most commonly used metric is not actually a reduction in crime. Instead, it is a reduction in the number of calls for police assistance. For instance, in Collinsville, Illinois, a Crime Free Housing Program Coordinator reported that "results from the first year of the program show a 30 percent reduction in calls to police in 'hotspots' or troubled property areas." However, during that same time period, the overall crime rate in "Collinsville increased by 4.2 percent," suggesting that calls for police assistance and actual crime rates may be divergent phenomena.[391] Similarly, the study of nuisance ordinances in Milwaukee raised the possibility that measures like home rule ordinances simply encourage less reporting of crime, rather than less actual crime.[392]

Second, the anecdotal evidence does not isolate the impact of eviction policies on the crime rate. The crime-free program is a multipronged approach, involving landlord training, environmental changes, and other interventions. Because much of the anecdotal evidence does not separate out the strands of a multipronged approach, it is very difficult to say which portion of any decrease in crime rates is attributable to the eviction policy and which portion is attributable to other interventions. Although some cities report having significant success with the program, these variations and flaws

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John Flint & Judy Nixon, *Governing Neighbours: Anti-Social Behavior Orders and New Forms of Regulating Conduct in the UK*, 43 URB. STUD. 939, 939 (2006).

390. It is also unclear whether individuals and families living in neighborhoods that most suffer the harms associated with crime support these kinds of ordinances. Some anecdotal evidence suggests they do. It is entirely possible, however, that something similar to the "urban frustration argument" that Richard Brooks described is occurring. He argued that the belief that the Chicago antigang ordinance was supported by the most impacted minority communities was false. As he writes:

> [C]laims of strong community support for Chicago's gang-loitering ordinance have been challenged by Albert Alschuler and Stephen Schulhofer: "The truth is that the anti-loitering ordinance was intensely controversial, . . . and that to the extent one can identify any predominant view, Chicago's anti-loitering ordinance was opposed by the very groups . . . identif[ied] as its principal supporters."

Richard R.W. Brooks, *Fear and Fairness in the City: Criminal Enforcement and Perceptions of Fairness in Minority Communities*, 73 S. CAL. L. REV. 1219, 1233 (2000) (footnotes omitted).

391. Livanos, *supra* note 16, at 108.

392. Desmond & Valdez, supra note 42, at 136.

in methodologies and metrics make it difficult to draw any conclusions from the anecdotal data.[393] In the absence of reliable empirical research demonstrating that home rule ordinances are an effective means of targeting the problems of bullying, criminality, and drug abuse that prompted them, it is difficult to justify the use of these ordinances.

2. *Alternative Approaches*. In the face of this lack of evidence regarding the effectiveness of home rule ordinances, there is a body of research suggesting that not only may they be ineffective, they may actually be counterproductive. Sociological and criminological studies suggest that

> dense and robust networks of community ties and mutual trust, among individuals and at the community level, leads to lower levels of criminality. Basic social ties—family, friends, school, and employment—form the building blocks of informal social control, and at the individual level, robust social, familial, and economic ties

393. Discrepancies in anecdotal reporting are common, and because each city uses different variables to measure any reduction in crime rates, it is difficult to compare statistics. One source alleges that Mesa, Arizona, (where the program began) had a drop in crime or calls to police of approximately 40 percent. DIANNA GRAVES, U. REGINA CMTY. RES. UNIT CRIME-FREE MULTI-HOUSING PROGRAM: RESEARCH SUMMARY 5 (Apr. 2011), *available at* http://ourspace.uregina.ca/bitstream/handle/10294/3427/CFMH%20Summary.pdf?sequence=1. However, another source states that the drop in crime in Mesa, Arizona, was closer to 75 percent. Josie Lee Villa, *The Relationship Between Police and Citizen Collaboration Regarding Crime in Multi-Family Rental Complexes* 29 (2011) (unpublished M.S. thesis, University of Missouri–Kansas City). Two Canadian cities, New Westminster and Victoria, reported a reduction in crime of approximately 40 percent, but each used a different metric. New Westminster used certain kinds of "priority calls," and Victoria used a number of different categories. GRAVES, *supra*, at 5. In other anecdotal reporting, one newspaper article suggests that crime-free lease addendums were effective in lowering calls to police in Des Moines, Washington. Keith Daigle, *Des Moines Rescinds Charges to Rental Property Owners for Crime Free Housing Program*, HIGHLINE TIMES, Feb. 25, 2010, http://www.highlinetimes.com/2010/02/25/news/des-moines-rescinds-charges-rental-property-owners-crime-free-housing-program. The article states that "there was a 48 percent decrease in calls to rental properties between 2004 and 2008 [the ordinance was enacted in 2005], as compared to a 36 percent increase in citywide calls. Also, between 2004 and 2008, serious and violent crimes . . . went down 41 percent, compared to a 14 percent citywide decrease." *Id.* Also, San Leandro says it experienced "a huge drop in crime at these communities." CTR. FOR PROBLEM-ORIENTED POLICING, *supra* note 306. And Champlin, a city of 23,000 people in Minnesota, attests that the result there was a 36 percent "overall reduction to calls for service and crimes." *Crime Free Program Testimonials*, INT'L CRIME FREE ASSOC., http://www.crime-free-association.org/testimonials.htm (last visited Jan. 16, 2015).

> are causally related to an individual's avoidance of criminal behavior.[394]

Home rule ordinances, while trying to leverage those bonds, actually stress and weaken the "familial and social ties that work to curb criminal behavior."[395] Further, the end result of many evictions under these ordinances is homelessness, a status that has been directly correlated to an increase in criminality and to a negative impact upon communities.[396]

If strong familial and social bonds and a stable home work to curb criminal behavior, then ordinances and policies should be initiated with this in mind. One appellate court noted that society has an interest in "safeguarding the family unit from unnecessary fractional pressures," and individuals should not be made to choose between familial devotion or legal fealty.[397] Instead of reflexively implementing laws like home rule ordinances, cities should first focus on targeting social problems through means and methods that do not involve penalizing people for the actions of others.

For instance, in the context of bullying, rather than implementing parental liability ordinances, cities could direct their resources to "assist[ing] parents in need."[398] Instead of chalking up juvenile misconduct to "bad" parenting, an innovative city might try embracing a multipronged approach that targets some of the broader issues underlying juvenile misconduct, like a "lack of parenting skills, resources and community support."[399] This kind of approach could include things like "parenting skills programs, readily accessible daycare and access to social programs," and it could have a much

394. Levy, *supra* note 12, at 569–70 (footnotes omitted).

395. *Id.* at 570.

396. Research indicates that homelessness is also directly linked to reincarceration of people who have served jail or prison sentences. For instance, homeless individuals on parole have been shown to be seven times more likely to abscond after the first month of release than those located in more permanent housing. Access to affordable housing has also been linked to decreased crime rates in low-income communities where people with criminal records often reside. Although reconnection with family members and establishing community connections can help reduce reincarceration, legal bars to allowing a family member back into the home after a conviction often make this impossible. N.Y. STATE BAR ASS'N SPECIAL COMM. ON COLLATERAL CONSEQUENCES OF CRIMINAL PROCEEDINGS, RE-ENTRY AND REINTEGRATION: THE ROAD TO PUBLIC SAFETY 219 (2006), *available at* http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26857.

397. MARKEL ET AL., *supra* note 110, at 43.

398. *Parental Liability Laws*, *supra* note 96.

399. *Id.*

more positive effect than the punitive consequences of parental liability ordinances.[400] Rather than simply blaming parents, tackling some of the broader, structural issues through investment in "adequate housing for low-income families, quality kindergarten programs, support for single parent families, community centres," child care, and after-school programs would enhance the goal of community security while creating an environment more conducive to human flourishing.[401]

Programs that offer group counseling and mentoring to youths could also be useful in reducing juvenile crime and violence. A recent controlled study of a program that used group counseling and "nontraditional sports activities to strengthen adolescents' social-cognitive skills" found that the intervention "improved school performance and engagement" and resulted in a 36 percent reduction in arrests.[402] Further, the program had an "extremely high" return on investment: its benefits were estimated to be up to thirty-one times the cost of its implementation, depending on how the societal benefit was measured.[403]

In the context of crime more broadly, interventions that use focused direct deterrence, supplemented with family support, job training, and other forms of assistance have been remarkably successful at curbing crime in a number of cities.[404] For instance, many cities with high homicide rates were able to lower those rates after

400. *Id.* Of course, as more cities move toward bankruptcy, these possibilities may become more difficult. *See generally* Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L.J. 1118, 1120 (2014) (discussing the financial difficulties cities have experienced following the 2008 recession and the subsequent reduction in services).

401. *Parental Liability Laws*, *supra* note 96. Although these measures would likely be appropriate for the majority of households, there may be a residual category of parental behavior that could be effectively addressed through a modified parental liability ordinance. When a parent's behavior actively enables or encourages the bullying or wrongful act, some sort of minor civil penalty could be appropriate. Such an approach should, for the most part, track the approach used toward secondary liability in the criminal law. *See generally* GABRIEL HALLEVY, THE MATRIX OF DERIVATIVE CRIMINAL LIABILITY (2012) (discussing the development and theoretical grounding of criminal law's treatment of personal and derivative forms of liability).

402. William Harms, *Study: Chicago Counseling Program Reduces Youth Violence, Improves School Engagement*, UCHICAGO NEWS (July 13, 2012), http://news.uchicago.edu/article/2012/07/13/study-chicago-counseling-program-reduces-youth-violence-improves-school-engagemen.

403. *Id.*

404. David Kennedy describes how such an intervention can work in DAVID KENNEDY, DON'T SHOOT: ONE MAN, A STREET FELLOWSHIP, AND THE END OF VIOLENCE IN INNER-CITY AMERICA (2012).

law enforcement personnel held meetings with offenders and their families during which law enforcement indicated that any further involvement in crime would result in heavy penalties, and that job-training support, housing help, and other forms of community assistance were immediately available to help transition to a crime-free life.[405]

Similarly, lessons from the public housing context suggest that a primary focus on fostering opportunities and targeting the underlying factors associated with misconduct, criminality, and drug abuse may be effective in some instances. Public housing authorities that have successfully transitioned from sites of extreme crime and violence to sites of decent housing have used evictions only sparingly and instead relied mainly on initiatives like "educational, anti-drug, resident participation, recreation, and scholarship programs," and "renovation of housing units, increased security, and youth [and] tutoring" programs to accomplish their transformations.[406]

Renovating housing units and improving the physical environment of buildings and neighborhoods has been associated with reduced crime rates. After upgrading the lighting and landscaping for one large apartment building that had been riddled with "youth gang violence, vandalism and drug trafficking," and building a playground, basketball court, and community center for the complex, there was a significant decrease in crime in the area.[407] Likewise, literally "cleaning up" the streets of a neighborhood often cleans up the streets in terms of crime reduction as well. Examples abound in which neighborhoods that invest in repairing streets, clearing debris, weeding, and better maintaining lots and alleys experience a subsequent drop in crime.[408]

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405. *Id.*; *see also* TRACEY MEARES ET AL., HOMICIDE AND GUN VIOLENCE IN CHICAGO: EVALUATION AND SUMMARY OF THE PROJECT SAFE NEIGHBORHOODS PROGRAM 3 (Jan. 2009).

406. As Weil explains, "public housing success stories" from cities like Chicago, Omaha, and Pawtucket, Rhode Island, show that "strict eviction policies alone are not responsible" for helping those sites improve. Instead, "increased spending on security and social programming," along with environmental upgrades like "provision of twenty-four hour foot patrols, police substations, improved lighting, identification card systems and single security entrances to buildings" were a crucial part of the success achieved. Weil, *supra* note 11, at 186.

407. *Safer Neighborhoods Through Community Policing: Volume 1: Successful Initiatives in 72 Cities*, U.S. CONFERENCE OF MAYORS 23–24 (2001), http://www.usmayors.org/bestpractices/community_policing_0401/safe_neighborhoods_1.pdf.

408. *Id.*

Cities can do better than home rule ordinances rooted in vicarious liability. Local governments are currently imposing third-party policing through vicarious liability as a one-size-fits-all solution to social problems that have diverse causes and factors, and likely need diverse, nuanced solutions. Fortunately, cities have previously demonstrated their capacity to address social problems through creative innovations, and they should once again harness that energy to come up with new solutions, rather than implementing ordinances that further marginalize and destabilize already vulnerable groups.[409] Cities have rightly identified the home as an important site in the fight against bullying, criminality, and drug abuse. However, cities should explore and implement policies that strengthen familial, social, and community ties, and promote stable housing, rather than policies that lead to increased destabilization, disruption, and broken familial and social connections.

CONCLUSION

The Supreme Court has held that the "right to maintain control" over one's home, and "to be free from governmental interference" is a "private interest of historic and continuing importance."[410] Now, however, home rule ordinances are transforming the *right* to control one's home into a *duty* to control all the people connected with that home, and deter them from engaging in wrongful conduct. That duty is supported by legal sanctions that apply if one fails to properly perform her third-party policing role. Although "even in the freest of societies, coercion may be a necessary evil," one must nevertheless "guard against instinctive prescription of coercive solutions to every problem or crisis that emerges."[411] Ideally, proposed policies should be carefully and critically examined to determine their efficacy and social meaning, and most importantly, to determine "how they create

409. At the very least, municipalities should drastically circumscribe the current scope of these home rule ordinances. The laws should include broad exceptions for victims of crime, should only apply to people demonstrably under a tenant's control, should require a conviction or finding of fact that the prohibited activity actually occurred, should only apply to conduct that presents a "substantial and direct threat to health and safety," and should limit the geographical scope to the leased premises. Most importantly, the fault level should be increased from vicarious liability to something more akin to active participation. Letter from Sargent Shriver National Center on Poverty Law to Belleville City Council on Crime Free Housing Ordinance (Apr. 2, 2013) (http://www.povertylaw.org/advocacy/housing/pubs/letter-to-belleville).

410. United States v. James Daniel Good Real Prop., 510 U.S. 43, 53–54 (1993).

411. Ayling & Grabosky, *supra* note 62, at 435.

us as modern subjects."[412] Home rule ordinances appear to be proliferating without due attention to their negative impact upon families and social groups, and without adequate analysis of whether they are actually effective in bringing about the goal of security they seek to achieve.

Placing responsibility for the wrongful acts of children, family members, and friends onto parents and heads of household constructs the home as a site of deviance and control. The web of third-party policing created by parental liability statutes, crime-free lease addendums, and nuisance ordinances subjects the normally private sphere of the family to intense internal surveillance and monitoring. These ordinances appear to encourage a form of microgovernance within the home that mimics or reproduces larger forms of law and order, and punishes those who fail to replicate these systems within their homes. The home or "the social space of the household becomes fully implicated in systems of surveillance and social control."[413]

Social problems such as bullying, drug abuse, and criminality need to be addressed, and creative and effective solutions need to be explored. Security is also a laudable goal, particularly in neighborhoods and buildings plagued by crime. However, as one federal judge stated, "[t]he city cannot simply start throwing innocent people out of private property to reduce crime in a troubled neighborhood."[414] The high costs of third-party policing must be taken into account when considering responses. Third-party policing may be appropriate in other contexts,[415] but it may be less appropriate when aimed at intimate, familial, and close social relationships. The dystopic effect of these types of third-party-policing ordinances is hard to ignore:

> [I]t is chillingly apparent that compliance . . . has a direct bearing on . . . familial relations—that parents, children, and siblings are compelled, at the very least, to "modify" how they interact and associate with each other. Regulation and social control are deeply insinuated in the most ordinary of microsocial relations—who visits for dinner or overnight? What is his or her conduct on or off the

412. HARCOURT, *supra* note 378, at 242.

413. Mele, *supra* note 11, at 131–32.

414. Armendariz v. Penman, 31 F.3d 860, 872 (9th Cir. 1994) (Trott, J., concurring in part, dissenting in part), *vacated in part on reh'g en banc*, 75 F.3d 1311 (9th Cir. 1996). Judge Robert L. Trott was referring to a series of housing-code sweeps in San Bernardino, California, where the city "faked a housing code emergency" and closed ninety-five buildings, evicting the tenants.

415. *See supra* text accompanying note 8.

> premises?—and the management of risks and their consequences becomes the responsibility of mothers, fathers, and teenagers. Likewise, otherwise innocuous visits from after-school friends, caregivers, and babysitters are fraught with risk. Here we see social regulation and control deeply insinuated in the most ordinary of behaviors.[416]

Indeed, if we think of home building as an "ideological enterprise[]," then the questions of who can access and maintain homes, and what rules may be state-enforced there, become even more significant.[417] Further, as the city emerges as a major source of rules governing homes and intimate spaces, its role in using these technologies of governance may become more pronounced, and may therefore warrant greater attention than local-government law tends to attract. In particular, the practical impact of these kinds of ordinances, alongside their symbolic participation in problematic histories of race, gender, and socioeconomic discrimination, raises concern over the narratives of responsibility and the meaning of "home" that they create, and the city's role in their construction.

416. Mele, *supra* note 11, at 132–33.

417. Rana Jaleel, *A Queer Home in the Midst of a Movement? Occupy Homes, Occupy Homemaking*, WHAT DEMOCRACY LOOKS LIKE, http://what-democracy-looks-like.com/a-queer-home-in-the-midst-of-a-movement-occupy-homes-occupy-homemaking (last visited Jan. 16, 2015).

TRIANGULATING RAPE

SARAH SWAN†

ABSTRACT

Civil actions for rape and sexual assault have recently been undergoing significant changes in both quantity and quality. Quantitatively, the number of these kinds of cases has increased dramatically since the 1970s. Qualitatively, the litigation has shifted from a woman versus man paradigm to a triangulated tort claim involving a female plaintiff, a male defendant, and a corporate or institutional third party entity that either facilitated or somehow failed to prevent the sexual harm. While it may seem odd to think of sexual assault as involving three parties, the legal forms of rape have traditionally been triangulated. Historically, rape was a legal wrong between two men regarding one's proprietary interest in a woman: one man's rape of another man's wife, daughter, or servant would be legally constructed as a wrong done to him. Then, as this triangulation faded and the criminal justice system became the main forum for rape redress, the criminal triangulation of state versus male defendant, regarding the wrong to a woman, became the dominant structure of rape law.

Despite the fact that the criminal regime has been demonstrably unsuccessful in addressing or deterring sexual harms, it remains the primary forum for their adjudication, and many cultural, legal, and political pressures encourage women to rely solely on this system. This article argues against those pressures, and asserts that triangulated claims in private law represent a potentially promising avenue of redress for sexual harms. These civil suits can function as "crimtorts" (private civil actions which target public harms). Although they must overcome some significant obstacles, triangulated civil suits can serve as an important tool in targeting the social realities that contribute to sexual assault.

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I.
INTRODUCTION

Lately, civil litigation for sexual assault and rape has been undergoing "a drastic metamorphosis."[1] In the early to mid-twentieth century, only a small

1. B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing*

number of civil claims were based on sexual harms; now, the number of these cases has risen "dramatically, perhaps exponentially."[2] In addition to this large increase in the number of claims, there has been "an evolution in the very nature" of the litigation itself.[3] Rather than a plaintiff-defendant binary, a new three-party structure has emerged in the civil litigation of sexual harms.[4] Plaintiffs are bringing tort suits not only against the perpetrators of sexual wrongs, but also against third-party institutions or corporations that facilitated or failed to prevent the sexual assault.[5]

The typical case involving this new three-party structure consists of a female plaintiff, a male defendant, and a third-party entity like a landlord, corporation, business, school, hospital, or other similar organization.[6] For example, female plaintiffs have brought actions against cruise ships and their employees for sexual assaults that occurred while they were passengers; against colleges and students after being sexually assaulted at fraternity parties or in dorm rooms; and against hospitals and medical personnel for sexual harms perpetrated during the course of treatment.[7] Plaintiffs typically assert general tort

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Liability on Landlords for Crime on the Premises, 42 CASE W. RES. L. REV. 679, 684 (1992), *quoted in* Janet Colaneri & Bobbi Reilly, *Non-Actor Liability for Sexual Assaults in Texas and the Effect of Insurance on Recovery*, 2 TEX. WESLEYAN L. REV. 279, 280 (1995). This article uses the term "civil litigation" to refer specifically to tort claims, though there are other avenues of seeking civil remedy for sexual harms. These include remedies in the "housing, education, employment, immigration, public benefits and family law arenas." Ellen Bublick, *Civil Tort Actions Filed by Victims of Sexual Assault: Promise and Perils*, VAWNET, 1 (Sept. 2009), http://new.vawnet.org/Assoc_Files_VAWnet/AR_CivilTortActions.pdf.

2. Ellen Bublick, *Tort Suits Filed by Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms, and Constituencies*, 59 S.M.U. L. REV. 55, 58 (2006) [hereinafter Bublick, *Tort Suits*].

3. *Id*. at 61.

4. *Id*.

5. Before the 1980s, it was rare for any person, institution, or corporation to be sued based on acts of third-party perpetrators. Colaneri & Reilly, *supra* note 1, at 282.

6. *See* Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1373 (2010). In this article, I chose to focus on the scenario of a female plaintiff and male defendant because it is the most common type of sexual assault incident. Sexual harms "are overwhelmingly wrongs perpetuated by adult men against women, and against children of both sexes, but mostly girls." Bruce Feldthusen, *Discriminatory Damage Quantification in Civil Action for Sexual Battery*, 44 U. TORONTO L.J. 133, 134 (1994). For scholarship on male-male rape, see Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259 (2011).

7. In *Doe v. Princess Cruise Lines, Ltd.*, 657 F.3d 1204, 1208 n.4 (11th Cir. 2011), the judge noted that congressional reports indicate that "sexual assaults and other violent crimes on cruise ships are a serious problem," relying on the House Subcommittee on Coast Guard and Maritime Transportation Staff's assessment that "178 passengers on North American cruise lines reported being sexually assaulted between 2003 and 2004." *Id.* (citing *Crimes Against Americans on Cruise Ships: Hearing Before the Subcomm. on Coast Guard and Mar. Transp. of the H. Comm. on Transp. and Infrastructure*, 110th Cong. 2 (2007)) [hereinafter *Crimes on Cruise Ships*]. Additionally, the court cited statistics stating that between 2000 and 2005, the FBI "opened 305 case files 'involving crime on the high seas,'" and approximately "45% of those cases were sexual assaults that occurred on cruise ships." *Crimes on Cruise Ships*, *supra*, at 12 (statement of Rep. Souder, Chairman, Subcomm. on Crim. Justice, Drug Policy, and Human Res., Member, H.

theories of assault, battery, intentional infliction of emotional distress, and false imprisonment against the individual defendants, as well as negligence against the institutional third-party defendants.[8]

This article explores the significance of the triangulated legal form created by a female plaintiff, male defendant, and third-party entity, and argues that such actions are a potentially promising avenue of redress for sexual harms. In particular, these actions may ultimately be able to target the social realities underlying sexual assault, and thus have a transformative effect on the prevalence of sexual assault generally, a goal which other forms of rape adjudication have not yet achieved. In exploring the significance of this new phenomenon, this article considers how rape has previously been triangulated into a legal form involving three parties. Understanding the new civil triangulation in this historical context allows the triangle to work as a "graphic schema," representing how parties and their respective rights, interests, and obligations change depending on the particular configuration of the tripartite structure.[9] This framework has the added benefit of allowing us to map the shifting political consequences that follow each change in the triangulation.

While it might seem strange to think of sexual assault in terms of a three-party structure, sexual assault and rape actually have a long tradition of legal triangulation. Part I of this article charts the early history of rape law, in which rape was legally structured as a wrong between two men. An authoritative male, rather than a harmed woman, would bring a legal action against the other man for violating his property interest. In this legal form, sexual access to women was configured as a commodity belonging to a patriarch. Beginning in the twelfth century, rape started to be seen as a personal wrong to the woman harmed, but it was not until the nineteenth century that women could seek civil remedy for sexual harms at all. Even then this access was limited to the rubric of seduction law.

This historical survey introduces many of the tensions that continue to permeate rape law. Issues surrounding the law's relationship to revenge, the appropriate role of public and private law, and the connections between compensation and commodification have long affected rape law, and still affect even its newest triangulated form.

Part II explores the triangulation of rape in the modern criminal justice system. As the form of patriarchy associated with the old proprietary view of sexual violation became obsolete, criminal legal triangulation became the dominant structure of rape law. Rather than a dispute between two men over a

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Comm. on Gov't Reform). The "majority of cruise ship sexual assault cases are not prosecuted." *Crimes on Cruise Ships*, *supra*, (statement of Salvador Hernandez, Deputy Assistant Director, FBI).

8. See *infra* Part IV for a more detailed discussion of the doctrinal issues in this kind of negligence suit.

9. The framework of the triangle and its description as a "graphic schema" are borrowed from EVE SEDGWICK, BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE 21 (1985).

harmed woman, the criminal justice system frames the wrong as a dispute between the state and a male defendant, regarding a harm to a woman. Also, whereas the historical triangulation protected the interest of an authoritative male in a society based on patriarchal order, the criminal triangulation promotes the interest of the state based on an assertion of the public interest.

Although the criminal triangulation has long been the main forum for rape redress, it has unfortunately failed as either a deterrent or remedial mechanism. The criminal law as it stands vindicates neither the public interest nor the private interests of the women who experience sexual harm. In part because the criminal triangulation constructs a binary narrative of sexual assault as an isolated event between a particular male defendant and a particular female plaintiff, and thereby obscures the broader social context that gives rise to sexual harms, criminal law has not been an effective remedy for rape.

Part III argues that civil triangulated actions are a potentially promising alternative to the criminal law's failure. Triangulated claims can act as "crimtorts," tort actions that accomplish the private law goals of compensation and remedy for the plaintiff, as well as the public law goals of deterrence and social change.[10] Triangulated claims also allow the plaintiff to undergo a process of subjectivization, a process that resists the objectification inherent in sexual assault and in the previous triangulations of rape law. The harmed woman takes on the role previously held by the patriarch and the state and asserts control over the legal process.

Further, through imposing liability on a third party, these triangulated claims show the social context in which sexual assault occurs. Institutions and third parties play a role in structuring masculinity and gender roles, and the environments they create often influence the prevalence of sexual harms. For instance, third-party decisions regarding safeguards, security protocols, and procedural responses when sexual harms do occur affect whether sexual harms continue to happen. Also, the relationship between the harmed woman and the third party has meaning and significance, and the action a third party takes to prevent sexual harms or to address them once they have happened sends a specific message about how the third party values those who are harmed. As tort liability incentivizes these third parties to take reasonable precautions and adopt policies and procedures that discourage sexual harms, sexual harms may become less normalized and less frequent.

Part IV sets out the obstacles that could stifle the robust development of civil triangulated actions in the area of sexual assault. Many of these obstacles connect to themes and tensions present in the historical and criminal triangulations. First, cultural pressures encourage women to leave vindication for sexual wrongs solely in the hands of the criminal law. However, even when women do so, they still have to overcome the myth that women lie about rape in

10. This term was coined by Thomas Koenig and Michael Rustad in their article *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J. L. REFORM 289 (1998).

order to seek revenge against men who have insulted them. Secondly, if both criminal and civil remedies are pursued, a complainant who has also filed a civil suit will face aggressive impeachment in the criminal trial, alleging that she has been improperly motivated by money. Thirdly, in civil cases, third parties may raise comparative fault claims in sexual assault suits and argue that the plaintiff was in some way responsible for her own assault. Fourthly, some courts are dismissing triangulated civil suits at the summary judgment stage, thereby preventing these actions from going to the jury, and impeding the development of this area of law. Finally, basic issues concerning access to justice present barriers to plaintiffs seeking redress in the civil courts.

Although these obstacles are significant, triangulated claims can still offer an appropriate means of redress for sexual harms. The development of triangulated civil claims maps the rise of feminism: as the feminist movement in the 1970s and 80s exposed gender inequalities and brought issues like violence against women into the public consciousness, civil claims began to increase.[11] As the push towards full gender equality continues, this form of redress will likely further expand and develop, with the effect that third parties will be brought into the project of gender equality through the means of tort liability and deterrence.

Moreover, moving away from the criminal justice system as the dominant means of redress may be one way in which feminism can begin to separate itself from the war on crime.[12] As Aya Gruber persuasively argued in a recent article, there are many ways in which the goals of feminism and the goals of the criminal justice system are not compatible. "[T]he philosophical tension between criminal punishment and feminism, the problematic politics of the current American criminal justice system, the limited potential of rape laws to shape gender norms, and the effects of criminal law on women victims" all suggest that feminism should consider "disentangling" itself from the criminal law.[13] Triangulated civil claims as a form of redress for sexual harms may be one step towards this kind of disengagement.

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11. *See* Tom Lininger, *Is it Wrong to Sue For Rape?*, 57 DUKE L.J. 1557, 1571 (2008) (noting that the number of published cases addressing third-party rape suits from 2003 to 2008 exceeds by 2,000 percent the number of published cases addressing such third-party suits in the early 1980s).

12. *See* Aya Gruber, *Rape, Feminism and the War on Crime*, 84 WASH. L. REV. 581, 653 (2009) (arguing that women should "begin the complicated process of disentangling feminism and its important anti-sexual coercion stance from a hierarchy-reinforcing criminal system that is unable to produce social justice"). For a commentary on how the American criminal justice system as a whole is dysfunctional, see WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011).

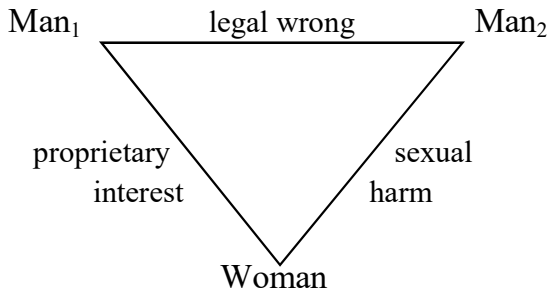
13. Gruber, *supra* note 12, at 585. *See also* Clare McGlynn, *Feminism, Rape and the Search for Justice*, 31 OXFORD J. LEGAL STUD. 825, 826 (2011) (arguing that "feminist strategy and activism must rethink its approach to what constitutes justice for rape victims, going beyond punitive state outcomes to encompass broader notions of justice, including an expansive approach to restorative justice").

II.
A BRIEF HISTORY OF RAPE LAW

A. Man v. Man, Regarding Woman

Perhaps surprisingly, rape, as a legal action, historically involved three parties: the victim, the perpetrator, and the victim's husband, father, or master.[14] Rape was legally constructed as a wrong that one man did to another, by having an unauthorized sexual encounter with a woman in whom the other man had a proprietary interest.[15] The law framed the wrong of rape as a violation of an authoritative male's property right, not as a personal harm to the woman herself.[16] In fact, in some historical periods, the property violation of literally stealing a woman through forcible abduction and stealing her through rape were indistinguishable. Under Roman law, for example, "raptus" referred to both "forcible abduction" and "forcible sexual relations."[17] This conflation of meanings was repeated in the English tort of ravishment, defined as "abducting and/or raping a woman."[18] Indeed, even the more modern term "rape" connotes a proprietary interest. "Rape" comes from the Latin "rapere," which means "to carry off or seize."[19]

The diagram below illustrates the dynamics of this legal triangulation:



14. Indeed, triangulating harms through a male authority figure has long been a feature of patriarchal legal systems. For instance, under ancient Roman law, the paterfamilias (male head of the household) brought all legal actions for violence or insults done to those under his control. *See* Francis Bowes Sayre, *Inducing Breach of Contract*, 36 HARV. L. REV. 663, 663 (1923).

15. Francis Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 10 (2011) (discussing how from the earliest written laws, rape was considered a property crime).

16. Jane Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 375, 382 n.25 (1993).

17. JAMES BRUNDAGE, LAW, SEX, AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE 48 (1987).

18. Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 YALE J.L. & HUMAN. 271, 313 (2002). *See also* Emma Hawkes, *Preliminary Notes on Consent in the 1382 Rape and Ravishment Laws of Richard II*, 11 LEGAL HIST. 117, 117 (2007) (noting that the distinction between rape and ravishment was blurred in medieval common law).

19. KATHRYN GRAVDAL, RAVISHING MAIDENS: WRITING RAPE IN MEDIEVAL FRENCH LITERATURE AND LAW 4 (1991) (writing that the common meanings of *rapere* were "to carry off or seize; to snatch, pluck, or drag off; to hurry, impel, hasten; to rob, plunder; and finally to abduct (a virgin). . . .").

This framework establishes men as its legal subjects, and the harmed woman as its object of dispute. The authoritative male was considered the legally injured party, and it was his consent to the sexual encounter that was important in determining whether a legal wrong had occurred.[20] In this framing, the presence or absence of the woman's consent to sexual relations was legally irrelevant.[21] For instance, because a father had the legal right to control sexual access to his daughter, a sexual interaction forced on her, but approved by the father, was not rape.[22] On the other hand, a sexual interaction she consented to, or even desired, was rape if the father had not approved.[23] Similarly, a wife's consent to extra-marital sexual relations was irrelevant in determining whether rape had occurred.[24] Because the legal wrong was rooted in the male proprietary interest, whether the woman was willing or forced was not an important part of the claim.

Female consent was irrelevant in another way, too. Given that the authoritative male held the right of remedy, choosing to initiate legal proceedings was at his sole discretion. The harmed woman had little say over whether a legal suit was brought or not.

Men seeking legal remedy for *raptus* could choose to seek financial compensation or criminal punishment for the wrong done to them.[25] This choice of remedy continued into the early common law; crime and tort, and their respective remedies, were not distinct in the way that they are today.[26] The avenues of available redress incorporated both punishment of the wrongdoer and compensation.[27] Furthermore, there was no distinction between who could bring

20. Larson, *supra* note 16, at 382 n.25.

21. *Id.*

22. *Id.*

23. For this reason, it is possible that some of the cases that fell into the raptus and ravishment frameworks were more akin to elopement than to what we now understand as rape. In fact, the Athenians considered the elopement type of seduction even worse than rape, since it involved not only an interference with the father's proprietary interest in his daughter's sexuality, it also took her feelings from him. *Id. See also* BRUNDAGE, *supra* note 17, at 48, 148 (discussing elopement in Roman and medieval common law).

24. *See* Larson, *supra* note 16, at 382 n.25 (noting that the historical focus of the crime of rape was on the damage done to the household or to the father's authority rather than on the personal injury suffered by the victim).

25. BRUNDAGE, *supra* note 17, at 48 (stating that "the father, employer, or owner of the victim of rape had a choice between seeking compensation for damages or criminal penalties for the offense" of forcible ravishment).

26. David Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59 (1996) ("In most instances, the same wrong could be prosecuted either as a crime or a tort.").

27. For example, Oliver Wendell Holmes described how under Anglo-Saxon law, "the winner of an action for damages could seize and destroy the animal or inanimate object which was the immediate cause of the injury suffered in order to 'punish' the losing party, and in Roman law contract breach was sometimes remedied through personally delivering the breacher to the aggrieved creditor." Antony Sebok, *Introduction: What Does It Mean to Say that a Remedy*

each type of claim, as either a victim or the king's officers, representing the government, could seek compensation or initiate proceedings to punish wrongdoers.[28] Following the Anglo-Saxon period, two distinct avenues emerged: writs of trespass would lead to compensation, whereas writs of felony, considered "instruments of vengeance," would lead to punishment.[29] There was no state agent who performed prosecutions; rather, wronged individuals were to serve as private prosecutors on their own behalves.[30]

When the compensation route was chosen, these legal historical triangulations commercialized the sexual dispute and commodified the sexual harm.[31] As long as the sexual injury was triangulated between two men, there was little objection to placing a monetary value on a woman's sexuality in this way. When her sexuality was understood as the property of the authoritative male, the translation of sexual violation into economic damages was not problematic for either courts or society.

As the availability of both compensation and punishment suggests, rape often blurred the line between a public and private offense, and different periods and regimes emphasized each of these aspects. For instance, under ancient Greek and Roman law, the focus was on rape as a private wrong, whereas in the time of Constantine in the fourth and fifth centuries, the focus was on rape as a public wrong.[32] The eleventh century took rape especially seriously, but understood it as "a crime primarily against the victim's father or male guardian."[33] The conception of rape as being fundamentally a public wrong, or fundamentally a private wrong, can therefore be viewed more as a political position than as an innate quality.

B. Political Context: Patriarchy

The historical triangulated legal form has obvious connections to a patriarchal society. The triangulation of rape as a wrong physically done to a

Punishes?, 78 CHI.-KENT L. REV. 3, 3–4 (2003).

28. *See* Seipp, *supra* note 26, at 59–60 ("Victims who preferred vengeance over compensation prosecuted their wrongdoers for crime. Victims who preferred compensation over vengeance sued their wrongdoers for tort.").

29. Thomas B. Colby, *Clearing the Smoke from* Philip Morris v. Williams*: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 430–31 (2008).

30. *Id.* at 431.

31. *See* LAURA HANFT KOROBKIN, CRIMINAL CONVERSATIONS: SENTIMENTALITY AND NINETEENTH-CENTURY LEGAL STORIES OF ADULTERY 47–48 (1998) (writing that the woman's eradication from the discourse surrounding litigation turns a suit concerning extramarital relations into a "legal story . . . about an economic relationship between two men, husband and lover, and it is about financially assessable damage to property").

32. *See id.* at 14, 107 (describing Greek law, which treated male authority figures as the aggrieved parties in rape actions and punished rape either through fines or more severe measures, and the law under Constantine, in which the principal innovation involved defining rape as a public offense rather than as a private wrong).

33. *Id.* at 209–10.

woman but legally occurring between men reflects the standard structure of homosocial relations: a male-male-female triangle.[34] As Claude Lévi-Strauss initially described, and Gayle Rubin later theorized upon, early social organization was dominated by these male-male-female triangulations, and the "exchange of women" between men that constituted them.[35] In early societies, men often exchanged women as a form of gift. For instance, a father would give his daughter in marriage to another man in order to cement a social bond between the two families.[36] However, the exchange of women could take many forms, some amicable and some hostile: women were "imported as brides, captured as war-booty . . . won in competitions, stolen through rape, hoarded as treasures, bequeathed as inheritances," and "even offered as sacrifices to the gods."[37]

These exchanges were a constitutive part of the social world; they generated bonds between men and helped them construct their social identities.[38] They also created and reflected a deep gender inequality: men had "certain rights in their female kin," while women lacked these "same rights either to themselves or their male kin."[39] The exchanges were part of a patriarchal society, establishing "relations between men, which have a material base, and which, though hierarchical, establish and create interdependence and solidarity among men that enable them to dominate women."[40] Indeed, the founding myths of Western civilization suggest that these triangulations are the very basis of patriarchy.[41]

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34. "Homosocial" is a term Eve Sedgwick used in her study of triangulation. It refers to social bonds between individuals of the same sex and encompasses the full spectrum of non-sexual and sexual desire. SEDGWICK, *supra* note 9, at 1.

35. Claude Lévi-Strauss described primitive kinship societies as formed in part by gift-giving, including exchanging women as a form of gift. *See* CLAUDE LÉVI-STRAUSS, THE ELEMENTARY STRUCTURES OF KINSHIP 61 (Rodney Needham ed., James Harle Bell & John Richard von Sturmer trans., Beacon Press 1969) (1949). Gayle Rubin focused on the implications of this exchange for women. *See* Gayle Rubin, *The Traffic in Women: Notes on the 'Political Economy' of Sex, in* FEMINIST ANTHROPOLOGY: A READER 92–94 (Ellen Lewin ed., 2006).

36. *See* LÉVI-STRAUSS, *supra* note 35, at 63.

37. VICTORIA WOHL, INTIMATE COMMERCE: EXCHANGE, GENDER, AND SUBJECTIVITY IN GREEK TRAGEDY xiv (1998) (discussing how Greek tragedy dramatized the exchange of women).

38. *Id.* at xiii.

39. Rubin, *supra* note 35, at 94.

40. Heidi Hartmann, *The Unhappy Marriage of Marxism and Feminism*, 3 CAPITAL & CLASS 1, 11 (1979), *quoted in* SEDGWICK, *supra* note 9, at 3. Although patriarchy is sometimes used as shorthand for a system in which men dominate women, here I use it in the anthropological sense, to describe a particular societal structure. Later, I will adopt Connell's use of the term:

> "[P]atriarchy" is a serviceable term for historically produced situations in gender relations where men's domination is institutionalized. That is to say, men's overall social supremacy is embedded in face-to-face settings such as the family and the workplace, generated by the functioning of the economy, reproduced over time by the normal operation of schools, media, and churches.

R.W. Connell, *The State, Gender, and Sexual Politics: Theory and Appraisal*, 19 THEORY & SOC'Y 507, 514 (1990) [hereinafter Connell, *The State, Gender, and Sexual Politics*].

41. Carol Gilligan describes how the relationship between these triangulations and patriarchy is evident in many of the foundational stories and myths of Western culture. For instance, in the

In addition to creating mutually beneficial bonds between men, these male-male-female triangulations are also often a site of male rivalry.[42] For example, within the patriarchal system, a forced exchange through rape was a hostile challenge to the patriarch with a proprietary interest in the harmed woman. As illustrated in a Biblical story, the rape of Dinah, this kind of challenge often elicited violent revenge. In this story, Shechem, a man from a neighboring city, raped Dinah, and then wanted to marry her.[43] He had his father request the marriage and offer daughters of his own in exchange, along with any bride-price quoted. Dinah's brothers told Shechem and his father that they would allow the marriage if Shechem and his father agreed to be circumcised. They agreed and were circumcised, but while they were recuperating Dinah's brothers snuck into the city and killed all the men to avenge their sister's rape.[44]

The legal forms that regulated rape and abduction were sometimes justified on the basis that they prevented this kind of patriarchal violence and retribution.[45] Self-help retaliation evolved into "the more regularized public order of a lawsuit," and legal actions were substituted for blood vengeance.[46] When traditional blood vengeance for rape took on a legal form that configured it as a wrong between men, the triangulated legal form offered men the status of legal subjects, while the harmed woman was reduced to an object of transfer or a

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Christian story of Adam and Eve, the Greek tragedy *The Oresteia*, Euripedes' *Antigone,* and the "quintessential story of patriarchy," *Oedipus*, "a trauma occurs in a triangle composed of two men and a woman," and the trauma is connected to the conflict that arises when "a father or a husband's authority is challenged." Eve and Adam disobey God, Atreus's wife and brother betray him, Antigone challenges Creon's authority through her fidelity to her brother, and Oedipus kills his father and marries his mother. When the patriarchal order of the triangle (man over woman, father over son) is challenged, a social (and psychic) rift develops that must be repaired if the social order is to be restored. According to the *Oresteia*, the substitution of the rule of law for blood vengeance is inextricably linked to the creation of the civic order of Athenian democracy. When "Orestes is acquitted for the crime of killing his mother at the first recorded trial," patriarchy is reinstated, and with this reinstatement, democracy and the rule of law come into being. CAROL GILLIGAN, THE BIRTH OF PLEASURE 6–7 (2002). Similarly, the republic of Rome also has a gendered triangulation as its founding myth, the rape of Lucretia. *See generally* MELISSA MATTHES, THE RAPE OF LUCRETIA AND THE FOUNDING OF REPUBLICS: READINGS IN LIVY, MACHIAVELLI, AND ROUSSEAU 4 (2001) (examining the subtle gendering of the foundations of republicanism, specifically "the intersection of speech and politics, of the origin and its repetitions, and of specularity and citizenship").

42. In some societies, women are still used as pawns in disputes between men and groups of men. For instance, in Pakistan, a feud between two family clans led to a tribunal's ruling that a woman from one clan (Mukhtar Mai) could be gang-raped by men of the rival clan to conclude the dispute. DISHONORED (Icarus Films 2007).

43. The story is found in *Genesis* 34:1–31.

44. For a discussion of how this story relates to concepts of vengeance, see Steven Eisenstat, *Revenge, Justice and Law: Recognizing the Victim's Desire for Vengeance as a Justification for Punishment*, 50 WAYNE L. REV. 1115, 1117 (2004).

45. *See* Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 837 (1995) (noting that seduction lawsuits, as a remedy for rape, advanced an "egalitarian ethos").

46. *Id. See also* Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1389 (2003) ("The comparative element of compensation, which seeks to counterbalance rather than simply repair the wrong done to the claimant, has a close affinity to revenge.").

market commodity.[47] The women behind these suits function only as "a species of 'damaged goods'" or "contested object[s];" their voices form no part of the legal claim, and the man "seeks compensation for the injury to *him* caused by interference with his property interest" in his daughter, wife, or servant.[48]

C. Early Steps towards Recognizing Rape as a Personal Injury to Women

In the twelfth century, canon law began to take the first steps towards conceiving of rape as involving a personal injury to the woman, and provided that women could themselves access the public law, and initiate criminal redress for rape (as long as they fulfilled a number of onerous procedural hurdles).[49] Civil actions, however, were still available only to fathers, husbands, and masters.[50] When authorized to bring criminal prosecutions, women did so: for a brief moment in England in the thirteenth century, women brought most of the rape prosecutions.[51] If the prosecution was successful (which was not often), the convicted man would often be fined, and the money would go to the royal treasury.[52] Interestingly, though, if the harmed woman and the defendant were to settle before trial, she would usually be the recipient of some compensation.[53]

Despite the fact that sexually-based harms were the kind of intentional tort most likely to harm women, it was not until the mid-nineteenth century that women were able to access a civil remedy for sexualized battery.[54] The tort of seduction became the catch-all for sexual assault.[55] Like rape, seduction actions were initially available only to an authoritative male, the father, but in the latter half of the long nineteenth century, many states legislated that women could

47. *See* KOROBKIN, *supra* note 31, at 93.

48. *Id.*

49. Thomas Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims (Or Learning from Our Mistakes: Abandoning a Fundamentally Prejudiced System & Moving Toward a Rational Jurisprudence of Rape)*, 18 BUFF. J. GENDER L. & SOC. POL'Y 73, 79 (2009).

50. *See* VanderVelde, *supra* note 45, at 828.

51. Rape was one of three potential actions women could prosecute. The other two were for the homicide of her husband and for a personal assault. Daniel Klerman, *Women Prosecutors in Thirteenth-Century England*, 14 YALE J.L. & HUMAN. 271, 271 (2002).

52. *Id.* at 277. Women's power to prosecute their own rapes came from the Statute of Westminster II. It was an exception to the usual norm, under which a husband or father would prosecute the rape on behalf of the female victim. *See* Stephanie Brown, Rape in Medieval England: A Legal History, 1272–1307, 1, 2 (2009) (unpublished M.A. thesis, Emory University), *available at* https://etd.library.emory.edu/file/view/pid/emory:1bbm 7/brown_dissertation.pdf.

53. Sometimes, the terms of the settlement were marriage between the victim and the perpetrator. Klerman, *supra* note 51, at 302. Klerman opines that the large number of rape prosecutions initiated by women in this period was in part because the jury was "expected to have gathered its evidence before trial," and thus the victim often did not have to testify to the details of the rape. *Id.* at 293.

54. VanderVelde, *supra* note 45, at 829.

55. *Id.*

bring seduction actions themselves.[56] Legal action around sexual predation and violence then appeared under the tort of seduction, rather than assault or battery.[57] Like rape, seduction also walked the line between a private and public wrong: as a tort, it often attracted substantial damages, and in some jurisdictions it was also a crime.[58]

In the early twentieth century, state laws began recognizing civil liability for rape in a more direct way.[59] This development was slow to evolve in part because of a pervasive conception of rape as a public wrong. Several states had criminal law doctrines "designed to discourage private recovery for what many considered a public wrong," and in many areas there was a "general cultural reluctance to transform so serious a public wrong into a claim for monetary damages."[60] These beliefs perpetuated the ironic result that for a long historical period, the "person *least able* to raise a claim as a civil cause of action was the person most injured."[61]

The explicit recognition of rape as a basis for civil liability did not immediately give rise to much civil litigation in this area. The few cases that existed in the mid-twentieth century generally focused solely on the defendant, and success rates were not high.[62] Beginning in the 1970s, though, more and more civil claims for sexual assault came before the courts, and as the decades passed, more and more of these claims involved third-party defendants.[63] Indeed, one study found that 74% of the published opinions for civil claims alleging sexual assault in the last forty years involved a third-party defendant.[64]

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56. Stephen Robertson, *Seduction, Sexual Violence, and Marriage in New York City, 1886–1955*, 24 LAW & HIST. REV. 331, 344 (2006). In the mid-seventeenth century, fathers sued for seduction under a "loss of services" framework, similar to that which governed enticements of servants. Seduction was also criminalized in many states. Larson, *supra* note 16, at 382–83.

57. VanderVelde, *supra* note 45, at 825. The public-private tension is evident here in another way, too. Some cases specifically stated that it was an error of law to allow what looked like rape to be treated as seduction. *See, e.g.*, Breon v. Hinkle, 13 P. 289, 296–97 (Or. 1887).

58. Larson, *supra* note 16, at 384 n.35 (noting that the damages awarded to plaintiffs in seduction actions were often substantial); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 18 (2012) (describing the criminalization of seduction).

59. Emily O'Brien & Alexandra Alvarez Minoff, *Rape*, 5 GEO. J. GENDER & L. 243, 252 (2004).

60. VanderVelde, *supra* note 45, at 824.

61. *Id.* at 828.

62. Bublick, *Tort Suits*, *supra* note 2, at 60.

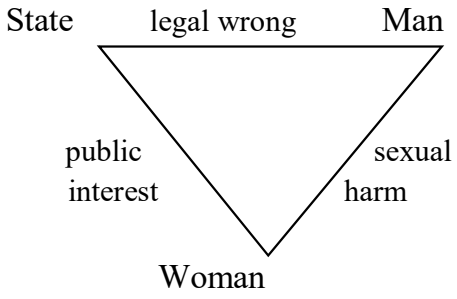
63. A number of factors likely helped spur this increase: the feminist movement of the 1970s brought more awareness to the prevalence and social harm of sexual assault, thus removing some of the stigma traditionally associated with it; new theories of third-party liability combined with more expansive insurance coverage suggested the potential for actual recovery of damage awards; and more concerted efforts from within the plaintiff's bar encouraged this type of litigation. Lininger, *supra* note 11, at 1560, 1570–71. *See generally* Jeannie Suk, *"The Look in His Eyes": The Story of* State v. Rusk *and Rape Reform* (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 10-23, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1546602.

64. Lininger, *supra* note 11, at 1570. Lininger does warn, however, that his study may have "overemphasized recent cases" and involved a "higher proportion of third-party claims" because

III.
THE CRIMINAL TRIANGULATION

A. State v. Man, Regarding Woman

Although the rate of civil litigation for sexually-based wrongs is currently increasing, the vast majority of the law's involvement with sexual assault and rape takes place within the context of the criminal law system.[65] Like the historical legal actions for sexual assault, the criminal law also triangulates rape. This time, though, the triangulation is between the state, a male defendant, and the harmed woman. In this triangulation, the state takes the position previously held by the patriarchal male, and the state and the harmed woman are linked not by a proprietary interest, but through the *public* interest:



The criminal triangulation and the historical triangulation have many points of similarity. First, both schemas largely ignore the harmed woman's desire to engage in the legal process. A female victim who wants the criminal system to pursue justice on her behalf will often be denied access to this path. Her consent or willingness to engage the process "is neither necessary nor sufficient for a prosecution to be brought."[66] On the other hand, a female victim who does not wish to engage the criminal process will find her consent or willingness to pursue the process similarly meaningless: her unwillingness is not enough to

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those claims were more likely to result in published decisions. *Id.* at 1570 n.59.

65. *See id*. at 1615 (noting that the overall rate of civil litigation for rape is increasing).

66. Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 719 (2007). Although women have traditionally been expected to vigorously resist rape, and in that sense be active, once the attack has occurred, the moment for resistance has passed and women are once again to assume a role of feminine passivity in relation to the criminal law. For more on resistance requirements, see Murray, *supra* note 58, at 20 n.95 (noting that case law often required "some measure of resistance" as resisting was "the natural instinct of every proud female"). She cites at n.95:

> People v. Barnes, 721 P. 2d 110, 117 (Cal. 1986) ("The law demanded some measure of resistance, for it remained a tenet that a virtuous woman would by nature resist a sexual attack."); State v. Rusk, 424 A.2d 270, 733 (Md. 1981) (Cole J. dissenting) ("She must follow the natural instinct of every proud female to resist, by more than mere words, the violation of her person . . . She must make it plain that she regards such sexual acts as abhorrent . . . .").

deter prosecution, either.[67] Indeed, as the Sixth Circuit of the United States Court of Appeals noted, a rape victim's role in a criminal prosecution cannot accurately be described as "voluntary."[68]

The criminal triangulation also mimics the historical triangulation in two additional ways. First, in both forms, the woman's role in the legal proceeding is overshadowed by that of the male participants. In the criminal triangulation, the face of the state—the prosecutors, judges, and police officers that process rape cases—are predominantly male, as are the defendants.[69] Other than as a witness, the harmed woman typically does not play a large role in the process. Indeed, in many instances, she will not only be figuratively absent from the legal process, she will literally be excluded from the courtroom for much of the trial.[70] The witness sequestration rule, strictly applied, holds that complaining witnesses should not hear the evidence of other witnesses and should not be in the courtroom unless they themselves are testifying.[71] Many prosecutors voluntarily follow this rule, "in order to make the evidence supporting their case as unassailable as possible."[72]

Secondly, in the criminal triangulation, the state, in assuming the responsibility of prosecuting the accused, is acting in a paternal manner similar to the old patriarchal figure. In its role as prosecutor, the state's "pattern[] of functioning"[73] involves "hierarchical rule and coercive authority"[74] that arguably has a gendered, masculine component. The result is a triangulation that both reflects a particular gender order and contributes to the structuring of that order.[75]

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67. Simons, *supra* note 66, at 719. Of course, it may have some effect, in that a prosecution with an uncooperative witness will be much more difficult.

68. The court states, "It cannot be said that a rape victim 'voluntarily' injects herself into a criminal prosecution for rape." Street v. Nat'l Broad. Co., 645 F.2d 1227, 1234 (6th Cir. 1981) (citing Time, Inc. v. Firestone, 424 U.S. 448, 457 (1976)) (analyzing "voluntariness" for the purposes of a defamation action brought against a woman for her role testifying in a rape prosecution).

69. *See* Patricia Yancey Martin, *Gender, Accounts, and Rape Processing Work*, 44 SOC. PROBS. 464, 464 (1997) (noting that of the different roles men and women play in rape processing, the police officers are generally male, while nurses are often female).

70. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 677 (2009).

71. *Id.* (citing 75 AM. JUR. 2D TRIAL §§ 176–77).

72. *Id.*

73. Sandra Marshall, *Appendix: Feminists and the State: A Theoretical Exploration*, *in* FEMINISTS NEGOTIATE THE STATE: THE POLITICS OF DOMESTIC VIOLENCE 93, 104 (Cynthia Daniels ed., 1997).

74. BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 118 (1984), *quoted in* Gruber, *supra* note 12, at 615.

75. Eve Sedgwick, in her work describing how male-male-female erotic triangles function in Victorian literature, theorized that the individual triangles, like the ones at play in the historical triangulation of rape, could be present in larger societal structures. She suggested that it was likely that "large-scale social structures are congruent with the male-male-female erotic triangles." SEDGWICK, *supra* note 9, at 25. The ways in which the criminal adjudication of rape replicates

In the criminal triangulation, the state and the harmed woman are linked through the public interest, rather than the old proprietary interest. In some ways, the public interest here functions like the proprietary interest did in the historical triangulation: it de-emphasizes the personal effect of the crime on the victim and focuses instead on the wrong to society.[76] The remedy further reflects this focus, as the convicted man is "expected to pay his debt to *society* rather than to his victim."[77] This debt to society is typically paid with the currency of time.[78] Although translating a wrong into time shares many of the same conceptual difficulties as translating a wrong into money, this temporal translation does not attract nearly the same cultural backlash.

B. Political Context: Perpetuating Current Gender Inequalities

The United States Supreme Court has stated that "[s]hort of homicide, [rape] is the ultimate violation of self."[79] Rape is a significant physical and psychological attack, and often understood as an attack upon the human personality itself.[80] It can result in serious long-term effects that radiate through nearly all aspects of the life of the assaulted.[81] Given the Supreme Court's ranking of rape as second to homicide in severity and given that criminal punishment can be seen as "a communicative act transmitting to the wrongdoer" and the community "how wrong his conduct was," one would expect rape to be vigorously prosecuted and severely punished.[82]

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many of the dynamics of the small-scale triangle suggests that this social structure shares many points of congruence with its smaller iteration. *Id.*

76. VanderVelde, *supra* note 45, at 842 (noting historical emphasis on the public wrong of rape rather than the private harm).

77. *Id.* at 846 (emphasis added). *See also* Elizabeth Adjin-Tettey, *Protecting the Dignity and Autonomy of Women: Rethinking the Place of Constructive Consent in the Tort of Sexual Battery*, 39 U. B.C. L. REV. 3, 7 (2006) (describing rape as a harm "against the state with the complainant only being a witness in the case against the perpetrator").

78. Adam Gopnik, *The Caging of America*, THE NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik. Gopnik writes on time as punishment, looking at how "the presence of time as something being done to you, instead of something you do things with, alters the mind at every moment." *Id.* The criminal system does use other currencies in addition to time, like community service and probation.

79. Coker v. Georgia, 433 U.S. 584, 597 (1977), *quoted in* Deborah Denno, *Why Rape is Different*, 63 FORDHAM L. REV. 125, 125 (1994).

80. There is much debate over whether rape is actually "the ultimate violation of self," or whether such a view reflects antiquated notions of chastity and sexual purity as women's highest value. For a discussion of this issue, see generally Holly Henderson, *Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention*, 22 BERKELEY J. GENDER L. & JUST. 225 (2007). In this article, I do not intend to take a normative position in this debate. Instead, I discuss the harm of rape only to discuss remedies, and the contrast between what the criminal justice system says and what it does.

81. *Coker*, 433 U.S. at 611–12 (Burger, C.J., dissenting) (1977), *described in* Denno, *supra* note 79, at 131.

82. Leigh Goodmark, *The Punishment of Dixie Shanahan: Is There Justice for Battered Women Who Kill?*, 55 U. KAN. L. REV. 269, 289 (2007), *quoted in* Leslie Garfield, *The Case for a*

Against this backdrop, the continuing high numbers of sexual assault and the way that sexual assault is actually dealt with in the criminal justice system are deeply troubling. According to a recent study from the United States Center for Disease Control, 18.3% of women in the United States "have been raped at some time in their lives, including completed forced penetration, attempted forced penetration, or alcohol/drug facilitated completed penetration."[83] However, criminal proceedings rarely result, and even when they do, convictions are unlikely. Catharine MacKinnon summarizes the situation: "In the United States most rapes are never reported. Most reported rapes are not prosecuted. Most prosecuted rapes do not result in convictions. The vast majority of rapists are never held accountable for their actions in any way."[84]

Criminal law reform has been attempted and has even achieved some successes, but these doctrinal and evidentiary changes have not resulted in an increased number of prosecutions nor an increased rate of conviction.[85] Ultimately, it appears that the criminal justice system is "inadequate to the task of protecting autonomous choice about sexual intimacy."[86] Either the state cannot or will not create a criminal law regime that effectively addresses sexual assaults. The failure to redress rape in the criminal context has an important political consequence: it maintains the status quo.

Many have written about the impact rape has on women and gender inequality.[87] In particular, social scientists and theorists have examined how the prevalence of rape structures the relations between the genders.[88] Women learn

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Criminal Law Theory of Intentional Infliction of Emotional Distress, 5 CRIM. L. BRIEF 33, 36 (2009).

83. CTRS. FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2010). Given this statistic, it is not surprising that the United States has one of the highest rates of reported rapes in the industrial world, even though most rapes are never reported at all. MICHAEL KIMMEL, THE GENDERED SOCIETY 397 (2011) (noting that the United States has among the highest rates in the industrial world for rape, domestic violence, and spousal murder).

84. CATHARINE MACKINNNON, SEX EQUALITY 751–52 (2007), *quoted in* Michele Alexandre, *"Girls Gone Wild" and Rape Law: Revising the Contractual Concept of Consent & Ensuring an Unbiased Application of "Reasonable Doubt" When the Victim is Non-Traditional*, 17 J. GENDER SOC. POL'Y & L. 41, 42 (2009). A recent report found that 98% of victims of rape never see their attacker caught, tried, and imprisoned. Leslie Bender & Perette Lawrence, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313, 325 (1993).

85. Bublick, *Tort Suits*, *supra* note 2, at 67 (noting that "criminal law reforms seem not to have meaningfully affected" numbers of prosecutions or convictions for rape).

86. *Id.* at 68.

87. Although the complexity and depth of the issue place it outside the scope of this article, it should be noted that rape law has also greatly impacted racial inequality. In particular, "Black men were made vulnerable to legal and extra legal violence by the identification of rape with a Black-offender-white-victim." Kimberle Crenshaw, *The Intersection of Race and Gender in Rape Law*, *in* WOMEN AND THE LAW 243, 243–247 (Libby Adler, Lisa Crooms, Judith Greenberg, Martha Minow & Dorothy Roberts eds., 4th ed. 2008).

88. *See, e.g.*, Catherine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635 (1983).

that there is an "ever present threat of sexual violence," and this lesson affects many of their actions.[89] They learn behaviors regarding what a woman should and should not do with her drink in a bar, where she can and cannot walk at night, when she should or should not be alone with a man in his house.[90] Women internalize "a socially constructed . . . fear of sexual crime," and this fear "has served to constrain women's movement through the world—what we do, what we say, where we go, how we live—arguably to the benefit of men's interests."[91]

While women learn that they fall into the category of prey, men learn that they belong in the category of predator or protector.[92] "Men learn that they will be feared as a threat, valued as a protector, and that violence will be tolerated should they be so inclined. They also learn that if they resist norms of masculinity [like violence and toughness,] they put themselves at risk of shifting into the category of prey," and may themselves become vulnerable to sexual violence.[93] The failure of the criminal justice system to combat the prevalence of rape perpetuates these beliefs and behaviors, and ensures that the existing gender structure of society continues.

C. The Particular Problem of Acquaintance Rape

The criminal justice system is most likely to respond to cases involving what Susan Estrich once described as "real rape," or others have called "paradigmatic rape."[94] Real or paradigmatic rape involves a violent attack by a "highly aggressive male stranger," at night, outside, which makes the victim "extremely fearful."[95] These stranger rapes are "considered paradigmatic crimes perpetrated by monstrous criminals," criminals who are "predatory monsters deserving of the most brutal forms of punishment."[96] Prosecutors are most likely to pursue cases that fit this paradigm, for they resonate most loudly with the typical law functions of "deterrence, denunciation, separating perpetrators from

89. JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW 23 (2011).

90. *Id.*

91. *Id*. Catharine MacKinnon noted the relationship between nation-building and rape, stating "This is how states are made . . . . [T]his is one way communities are destroyed and states are created: by whom you can rape . . . . [This] is a part of a process through which nation-states have often been created." CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES (2006), *quoted in* Jose Alvarez, *MacKinnon's Engaged Scholarship*, 46 TULSA L. REV. 25, 27 (2010).

92. Gruber, *supra* note 12, at 609.

93. *Id.*

94. *Id.* at 599 (arguing that "nonparadigmatic rapes were underreported and underpunished").

95. Regina Schuller, Blake McKimmie & Marc Klippenstine, *Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes*, 13 NEW CRIM. L. REV. 759, 763 n.20 (2011).

96. Gruber, *supra* note 12, at 584, 594.

society, and ensuring the safety of complainants and other potential victims."[97]

However, even paradigmatic rape cases that involve "paradigmatic rape victims . . . and their hideous violators"[98] suffer from a lack of state funding and adequate resources. For instance, the creation of rape kits is often held up as an example of success in rape reform (in that the successful completion and testing of rape kits enables the gathering of appropriate evidence), but victims' access to rape kits is often limited and rape kit testing is not done in a timely manner.[99] Wasilla, Alaska, charged victims or their insurers for the cost of performing rape kits, thereby transferring the cost of this investigatory measure onto victims.[100] Furthermore, rape kit backlogs have prevented thousands of kits from being tested until well past the statute of limitations, meaning the potential cases each kit represents will never proceed.[101]

Additionally, many sexual assault cases have been massively mishandled. For example, in 1999, *The Philadelphia Inquirer* exposed the Philadelphia Police Department's practice of hiding sexual assault cases under a non-criminal classification code that meant such cases would never be pursued.[102] For nearly twenty years, Philadelphia's police department had deliberately misclassified thousands of sex crimes in this manner, which meant that approximately "one-third of all reports from the mid 1980s through 1998," were not properly investigated.[103] This mishandling was only exposed after it was revealed that a sexually assaulted and murdered woman was in fact one in a string of previous sexual assaults by the same offender, and that those previous assaults had not been investigated because of this practice.[104]

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97. Adjin-Tettey, *supra* note 77, at 6.

98. Gruber, *supra* note 12, at 639.

99. In Washington, D.C., in 2010, the police had to approve the dispersal of rape kits and would often withhold approval in circumstances of date or acquaintance rape. Amanda Hess, *Test Case: You're Not a Rape Victim Unless Police Say So*, WASHINGTON CITY PAPER, Apr. 9, 2010, http://washingtoncitypaper.com/articles/38671/test-case-youre-not-a-rape-victim-unless-police-say.

100. Kits cost between $500 and $1200. Ken Dilanian & Matt Kelley, *Palin's Town Used To Bill Victims for Rape Kits*, USA TODAY, (Sept. 11, 2008, 10:25 AM), http://www.usatoday.com/news/politics/election2008/2008-09-10-rape-exams_N.htm. *See also* Jordan Matsudaira & Emily Greene Owens, *The Economics of Rape: Will Victims Pay for Police Involvement?* (May 20, 2009) (preliminary draft), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1407636 (estimating that the shift of the cost of approximately $1200 from the city government to victims reduced the number of reported rapes by between 50 and 80%).

101. Milli Kanani Hansen, *Testing Justice: Prospects for Constitutional Claims by Victims Whose Rape Kits Remain Untested*, 42 COLUM. HUM. RTS. L. REV. 943, 944 (2011).

102. *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Carol E. Tracy, Executive Director, Women's Law Project) (describing numerous other examples of disturbing police mishandling).

103. *Id.*

104. *Id.* She also provides many other examples of police departments mistreating sexual assault cases and notes that her organization sees "chronic and systemic patterns of police refusing to accept cases for investigation, misclassifying cases to non-criminal categories so that

For the allegations of sexual assault that do make it past the investigatory stage and into the courtroom, the criminal law's triangulation of the wrong as between the state, the male defendant, and the harmed woman has an unexpected result: it actually narrows the scope of responsibility for rape and constructs the wrong as part of a purely "binary relationship" between the accused and the victim.[105] The criminal law tends to reify the early modern view of sexual assaults as "anomalous individual acts, perpetrated by mentally ill men who had not adjusted to proper masculine norms, against women and children who more than occasionally invited such overtures or failed to protect themselves properly."[106]

In focusing on "stories about individuals, as opposed to complex systems and institutions,"[107] the criminal law obscures the role these systems and institutions play in sexual assault.[108] Using its discursive powers, the criminal law "'recasts social dynamics as characteristics of individuals.' (So, for example, the problem is a man's anger management, not economic inequality between men and women and the failure of the state to protect.)"[109] As Ana Gruber writes:

> The current dialectic of criminality and victimhood counsels that crime is a problem of individual criminal pathology and not social hierarchy. In this way, the criminal system obscures the economic and sociological conditions of rape and relieves "pressure on the government and society to remove the constraints on women's agency." Criminal law's unitary concern with victimhood and criminality absolves "[o]thers in a position to predict and prevent rape" and presumes immunity for "those who create an ideological system that makes rape possible." By engaging in the "false dichotomy" of agency and victimhood, the criminal law has the effect of decontextualizing rape from the larger issue of gender inequality.[110]

The narrative of rape as a crime perpetuated only by individual, deviant, monstrous men has another important effect: it elides the problem of

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investigations do not occur, and 'unfounding' complaints by determining that women are lying about being sexually assaulted." *Id.* In Canada, a police department was successfully sued for failing to warn women about a serial rapist targeting women in a specific neighborhood. *See* Melanie Randall, *Sex Discrimination, Accountability of Public Authorities and the Public/Private Divide in Tort Law: An Analysis of* Doe v. Metropolitan Toronto (Municipality) Commissioners of Police, 26 QUEEN'S L.J. 451 (2000).

105. Gruber, *supra* note 12, at 623.

106. CONSTANCE BACKHOUSE, CARNAL CRIMES: SEXUAL ASSAULT LAW IN CANADA, 1900–1975, 9 (2008).

107. Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 436, 467 (2006).

108. Gruber, *supra* note 12, at 624.

109. NEDELSKY, *supra* note 89, at 68–9.

110. Gruber, *supra* note 12, at 624.

nonparadigmatic or acquaintance rapes.[111] Once rape is constructed as a problem of individual pathology, nonparadigmatic cases necessarily fall outside it.[112] These nonparadigmatic cases, though, actually form the vast majority of rapes; most rapes are not of the "stranger in the bushes" variety, but are instead acquaintance rapes committed by men who know or stand in some sort of social or other relationship to the harmed woman.[113]

These nonparadigmatic rapes attract neither the same powerful rhetoric nor the resources that paradigmatic cases do.[114] They are unlikely to appear in criminal court. The men that perpetrate them do not look like criminals; rather, they look like typical friends, neighbors, and acquaintances. Accordingly, there is a perceived disconnect between "the narratives justifying sex offender registration, civil commitment, residency requirements, and harsh punishments" and the picture of "the average college date rapist."[115] The situations that give rise to nonparadigmatic rapes also often look more like situations where consensual sex occurs, and so the conduct is more likely to be characterized as an "imperfect sexual encounter" than as the crime of rape.[116] The behaviors and beliefs about behaviors that underlie date or acquaintance rape, like "male goal-orientation and female coyness, are clearly sexist but they are far from deviant."[117] These nonparadigmatic cases are unlikely to be pursued criminally, and when they are, they are unlikely to result in convictions.[118]

IV.
THE TRIANGULATED CIVIL ACTION

A. Woman v. Man and Third-Party Entity

Although the criminal law has failed to adequately address rape (particularly acquaintance rape), it nevertheless remains the dominant structure of rape law.

111. *Id*.

112. *Id.* at 585.

113. *See* NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 35-6, *available at* www.ncjrs.gov/pdffiles1/nij/183781.pdf; Martha Burt, *Rape Myths*, *in* CONFRONTING RAPE AND SEXUAL ASSAULT 129, 130 (Mary E. Odem & Jody Clay-Warner eds., 1998)

114. Gruber, *supra* note 12, at 638.

115. *Id.* at 641.

116. *Id*. at 644.

117. *Id.* at 643.

118. See ROBIN WARSHAW, I NEVER CALLED IT RAPE 144 (1988), *cited in* Bublick, *Tort Suits, supra* note 2, at 57, for a discussion of how the failure of the criminal law to address acquaintance rape is likely connected to the low reporting rate. For a discussion of how current estimates suggest that only 14% of victims report their sexual assaults to the police, see Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 CRIME & JUST. 565, 565 (2010). Finally, for a discussion of how the most common reason given by those who choose to not report is that they consider it a "private or personal matter," see Myrna Raeder, *Litigating Sex Crimes in the United States: Has the Last Decade Made Any Difference?*, 6 INT'L COMMENT. ON EVIDENCE 1, 8 (2011).

Most rapes, if they do make it into the legal system, will come through this forum. However, more and more women are now advancing civil claims as well, either as an alternative or a complement to criminal prosecution.[119] Women "have brought tort claims" both "when criminal prosecution was unsuccessful," and "also when criminal prosecution was not pursued."[120] The majority of these claims take the form of triangulated civil cases.[121] They are brought by a female plaintiff against an individual defendant and a corporate or institutional third party.[122]

These claims offer a number of procedural and doctrinal advantages over criminal adjudication.[123] In civil court, the burden of proof is lower; procedural protections are not weighted in the defendant's favor; both parties have equal rights of discovery; both parties may or may not have legal representation; the plaintiff controls the process and strategy and decides whether or not to issue a claim; and the plaintiff has the potential to receive remedies beyond just monetary compensation, like apologies or the relocation of the defendant.[124] Perhaps most significantly, the fact that there is no tort of rape, and rape is instead brought under broader torts like assault, battery, false imprisonment, or intentional infliction of emotional distress, means that a grossly intrusive technical interrogation into "insufferable details about exactly which digit touched which orifice" will usually not be necessary to make out the elements of

119. In her discussion of tort claims for sexual assault in the United Kingdom, Nikki Godden expresses concern that addressing acquaintance rape in the context of private law will essentially create two categories of rape: criminal rape and civil rape. Nikki Godden, *Claims in Tort for Rape: A Valuable Remedy or Damaging Strategy?*, 22 KING'S L.J. 157, 177 (2011). However, this two-tier structure already exists within criminal law in the American criminal justice system. Currently, acquaintance rapes are not often pursued in that forum. Thus, the choice may be between a civil remedy for acquaintance rape and no remedy at all.

120. Bublick, *Tort Suits*, *supra* note 2, at 64.

121. In some circumstances, there will be no appropriate third party and a party may want to consider her tort options against the individual defendant solely. For a consideration of the advantages of seeking a tort remedy in these situations, see generally Camille LeGrand & Frances Leonard, *Civil Suits for Sexual Assault: Compensating Rape Victims*, 8 GOLDEN GATE U. L. REV. 479 (1979) (discussing the advantages to the sexual assault victim of a civil law remedy); Holly Manley, *Civil Compensation for the Victim of Rape*, 7 COOLEY L. REV. 193 (1990) (arguing that civil suits help the victim regain control and have an expressive function in that they signal to the public that rape victims are no longer willing to remain silent about rape); and Nora West, *Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis*, 50 U. TORONTO L. REV. 96 (1992) (discussing tort suits for rape in the Canadian context).

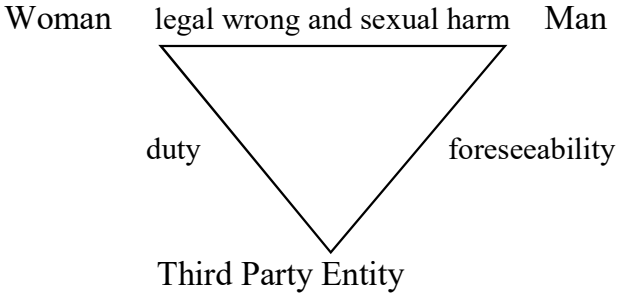
122. For an analysis of the doctrinal aspects of the duty and foreseeability components, see Chamallas, *supra* note 6, at 1373, which discusses the responsibility of third-party institutional actors, and Bender & Lawrence, *supra* note 84, at 326, which argues for the inclusion of women's perspectives and experiences in duty and foreseeability analysis.

123. Of course, there are some disadvantages, too. For instance, civil litigation can take years, the victim may still be required to reveal details about her sexual life, and issues regarding the applicability of rape shield evidentiary rules remain unresolved in many states. Bublick, *Tort Suits*, *supra* note 2, at 76.

124. *Id.* at 72–74. I use remedy in the broad sense, meaning anything that the plaintiff considers to be a remedy, including all aspects of settlement.

the tort.[125]

In addition to offering these procedural and doctrinal advantages and providing access to the empowering, expressive, and normative powers of civil litigation generally, the civil legal triangulation has special significance when compared to the past triangulations of rape law. Civil triangulation takes the following general form:



In this triangle, the harmed woman occupies the position held first by the patriarchal male, and then by the state. She is connected to the third party not through another person's proprietary interest, or through the state's public interest, but through a duty owed to her under negligence law. Moreover, whereas in each previous triangulation the person who experienced the sexual harm was disconnected from the assertion of the legal wrong, in this civil triangulation the legal wrong and sexual harm are finally bound together.[126] In this triangulation, the harmed woman is configured as a full legal and political subject, empowered in her interaction with the defendants, able to narrate her own claim, and potentially able to achieve a remedy that is meaningful to her.

1. Subjectivization

Unlike the historical and criminal triangulations, where the harmed woman's role in the legal process is basically peripheral, this triangular structure configures women as full legal subjects. These civil litigation cases are built upon a subject-subject (and third-party subject) framework, rather than the subject-object framework that dominates the historical and criminal triangulations.[127] This framework grants subjectivity to the harmed woman. Achieving subjectivity in the context of sexual assault is particularly important, given that rape and sexual assault are themselves a form of objectification. They objectify through power exploitation, where "the more powerful party may impose his or her will on the other, regardless of the other's desires and interests.

125. *Id.* at 73 (noting that a minority of jurisdictions have created specific sexual torts, some of which are problematic in that they import technicalities from the criminal law).

126. In the historical triangulation, the sexual harm was done to a woman but the legal wrong was done to the patriarch, and in the criminal triangulation, the sexual harm was done to a woman but the legal wrong was done to the public.

127. Henderson, *supra* note 80, at 232.

Such an act reflects an implicit claim of superiority by the more powerful actor, and an affront to the victim."[128] Through imposing his will on another, a male enhances his masculine subjectivity, while at the same time he objectifies the woman. Further, when a male imposes his will on a woman, he renders her invisible, both literally, in the sense that "the perpetrator 'covers' her," but also figuratively, in the sense that the rape harms her subjectivity.[129]

Bringing a civil suit resists this objectification process. Through a civil action, a woman subverts the power structure "by challenging the actions of a powerful aggressor."[130] Further, she asserts her own ability to seek redress and indicates that she is unwilling to act in a subordinate role to a prosecutor in a criminal case.[131] Ultimately, the civil action allows her to assert her inherent dignity. Dignity can be viewed as "a *status*-concept: it has to do with the *standing* (perhaps the formal legal standing or perhaps, more informally, the moral presence) that a person has in a society and in her dealings with others."[132] It is the "status of a person" that means in part that she "has the wherewithal to demand that her agency and her presence among us as human beings be taken seriously and accommodated in the lives of others, in others' attitudes and actions towards her, and in social life generally."[133] In a civil triangulation case, a harmed woman can affirm that she has such standing and status.

2. Empowerment

Essentially, tort law empowers those who have been harmed in legally cognizable ways to seek redress.[134] A harmed woman can assert her standing and status because the tort action provides her with mechanisms that force the individual defendant and the third party "to heed her complaint, deal with her accusations, and acknowledge the wrongfulness" of the harm done.[135] The defendants "must listen and respond" to the claim, or face the consequences of failing to do so.[136] In this legal interaction, there is a different power differential than in the original assault: "in court, as opposed to the original occurrence, the victim is in control of the interaction."[137] This kind of empowerment is

128. Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 961 (2009).

129. SABINE SIELKE, READING RAPE: THE RHETORIC OF SEXUAL VIOLENCE IN AMERICAN LITERATURE 4 (2002).

130. Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1604 (2007).

131. Lininger, *supra* note 11, at 1585.

132. Jeremy Waldron, *How Law Protects Dignity* 2, (New York Univ. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 11-83, 2011), *available at* http://ssrn.com/abstract=1973341.

133. *Id.* at 3.

134. Perry, *supra* note 128, at 961.

135. *Id.* at 982.

136. *Id.* at 983.

137. *Id.*

particularly important because many victims experience civil trials as a re-creation of the assault.[138] Women speak of wanting "to confront the aggressor in a 'secure space,' as though it were a playback of the aggression, where the survivor is given more power. It is a recreated scenario where the power is distributed differently, where the survivor controls more of the interaction."[139] Moreover, since many of these cases involve traditionally disempowered, "vulnerable victims, including children, the permanently or temporarily disabled, and the infirm," empowerment is especially significant in the sexual assault context.[140]

3. Narration

In addition to empowering the plaintiff in this manner, the triangulated civil action also provides for another form of empowerment: *telling*.[141] Plaintiffs in civil cases often have a deep need to be *heard*, and fulfillment of this need requires "the ability to present one's undistorted and uninterrupted account of the events, including facts, views, and feelings."[142] Sharing a story with others can be an important part of the healing process: "bearing witness to the trauma," and "transforming traumatic memory into a narrative that can be worked into the survivor's sense of self and view of the world" is essential to "working through, or remastering, traumatic memory" and thereby shifting from "being the object or medium of someone else's (the perpetrator's) speech (or other expressive behavior) to being the subject of one's own."[143] The triangulated civil action meets the plaintiff's narrative need and provides her with a "neutral and dignified arena" in which to tell her story.[144] In contrast to her diminished narrative position in the criminal or historical triangulations, the plaintiff is the subject of this legal story.

4. Personal Remedy

Both the historical and criminal triangulations directed the remedy towards someone other than the harmed woman. In the historical triangulation, the remedy was directed at the authoritative male, and in the criminal triangulation, the remedy is directed at the public. In the civil triangulation, however, the remedy is directed at the person who suffered the harm, the plaintiff.

138. Nathalie Des Rosiers & Bruce Feldthusen, *Legal Compensation for Sexual Violence: Therapeutic Consequences and Consequences for the Justice System*, 4 PSYCHOL. PUB. POL'Y & L. 433, 439 (1998).

139. *Id.*

140. Bublick, *Tort Suits*, *supra* note 2, at 67.

141. *Id.* at 980–81.

142. Perry, *supra* note 128, at 980.

143. NEDELSKY, *supra* note 89, at 216 (quoting SUSAN J. BRISON, AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF 68 (2002)).

144. Perry, *supra* note 128, at 980.

The standard remedy in the civil system is compensation. But, because the current face of rape in the law is the monstrous deviant predator who randomly attacks strangers, the remedy most often thought of as appropriate for rape is criminal punishment, typically in the form of incarceration. As outlined in Part II, though, most rapes do not fit this model, and criminal conviction and punishment are not how most sexual assaults end. Currently, the most likely result of a sexual assault is that the law will never redress it. Given this reality, the debate is not really one of compensation versus criminal punishment, but rather one of compensation versus no remedy at all.[145]

Compensation as a remedy has multiple expressive and practical functions and benefits. It "constitutes recognition of the violation of a victim's bodily autonomy and dignity," compensates for "tangible and intangible harms," and "serves punitive and deterrence purposes."[146] Damage awards can give plaintiffs a "symbolic victory," a legal acknowledgement that there was a wrong committed.[147] As their purpose is to "make the plaintiff whole," compensatory awards can also alleviate the financial burden associated with treatment in the aftermath of sexual assault, and minimize the financial impact of the assault.[148]

However, the appropriate measure and apportionment of damage awards is often contentious and inconsistent.[149] In triangulated civil claims between 2001 and 2004, the majority of compensatory damage awards were between one hundred thousand and two hundred thousand dollars.[150] There have also been a number of more substantial verdicts, including awards of over one million dollars,[151] and a recent study found that the average damage award was closer to six hundred thousand dollars.[152] Further, some cases resulted in large punitive damages against the individual defendants.[153] In other cases, though, "the court or jury awarded no damages at all,"[154] a conclusion that is particularly

145. As Bublick notes, "whether tort litigation would be a second-best solution to the criminal law depends on one crucial factor—what the criminal law would actually have done." Bublick, *Tort Suits*, *supra* note 2, at 75.

146. Adjin-Tettey, *supra* note 77, at 8.

147. Sherwin, *supra* note 46, at 1405. Most successful plaintiffs will be able to recover their damage awards from third parties. Recovering these awards from the individual defendants who perpetrate the wrong, however, can be difficult. Liability insurance typically does not cover intentional torts, and although some individual defendants may have the means to satisfy a judgment, many will not. Bublick, *Tort Suits*, *supra* note 2, at 100.

148. Catherine A. Carroll, *Addressing the Civil Legal Needs of Sexual-Assault Victims*, 58 WASH. ST. B. NEWS 21, 22 (2004).

149. Bublick, *Tort Suits*, *supra* note 2, at 95. There have also been problems with courts undervaluing women's injuries. For a discussion of the way that tort law treats claims made by members of marginalized groups, see generally MARTHA CHAMALLAS & JENNIFER WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER AND TORT LAW (2010).

150. Bublick, *Tort Suits*, *supra* note 2, at 96–97.

151. *Id.* at 97.

152. Lininger, *supra* note 11, at 1569.

153. Bublick, *Tort Suits*, *supra* note 2, at 81.

154. *Id*. Interestingly, "[p]unitive damages in nineteenth-century America protected the

problematic when one considers that damages serve as "a signal of the social worth of plaintiffs and a societal measure of their suffering."[155]

While compensation is an appropriate remedy for many plaintiffs, others reject the idea that financial compensation can remedy the harm they have suffered. They look at compensation as a form of "blood money."[156] For example, some Holocaust survivors refused to accept German reparations, and some Korean women forced into prostitution in World War II refused to accept compensation from the Japanese.[157] To them, blood money merely commodified their pain, and they experienced this translation of their pain into economic terms as a further objectification: "[n]ot only were they hurt, but that hurt could be bought. The infinity of anguish could be measured; owned."[158] In their view, compensation was not "a recognition of the harms which they were forced to suffer," but a derogation of them and their loss.[159]

In such cases where the victims are uncomfortable with the idea of receiving monetary compensation or situations where compensation is simply unavailable, triangulated tort claims can allow victims the flexibility to "shape the litigation to meet their personal objectives."[160] In the context of settlement negotiations, victims can obtain goals unrelated to monetary compensation, like apologies, "or the assailant's transfer to a different university, apartment complex, or job," or a change in policies and procedures that could help prevent future harms.[161] In settlement negotiations, victims can bargain for outcomes like these,[162] and plaintiffs can feel that they are advancing the public interest by prompting "third-party defendants to take precautionary measures that could prevent future rapes" or by effecting changes in the way institutions address sexual assault complaints.[163] Plaintiffs have successfully convinced apartment building owners to improve their security, persuaded employers to engage in heightened supervision and more thorough background checks, and caused other entities to

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sanctity of the family as a social unit from such external threats as seduction, loss of services, and criminal conversation. Familial crimtorts in the modern period generally punish oppression within the family, not external threats to the family unit. Today, wives and children receive punitive damages for familial sexual abuse and other torts by family members." Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 302–03 (1998).

155. CHAMALLAS & WRIGGINS, *supra* note 149, at 5.

156. LAURA BLUMENFELD, REVENGE: A STORY OF HOPE 96 (2002), *quoted in* Eisenstat, *supra* note 44, at 1160.

157. BLUMENFELD, *supra* note 156, at 96.

158. *Id.*

159. Eistenstat, *supra* note 40, at 1162 (referencing Ralph Ranalli, *Victims Agonize Over Church Deal; Struggle with Moral, Legal Questions About Accepting Settlement*, BOSTON GLOBE, Oct. 8, 2003, at B1, which tells the story of victims of clerical sexual abuse in Boston deciding whether to accept the Archdiocese's $85 million settlement).

160. Bublick, *Tort Suits*, *supra* note 2, at 73.

161. *Id.* at 74.

162. *Id.*

163. Lininger, *supra* note 11, at 1565.

change their complaint procedures.[164] Such safeguards can help prevent future assaults.[165] Also, within this process of negotiation, there can be a recognition of the "traumatic event and its consequences," as well as an "assignment of responsibility for the harm."[166] These factors may "exert a powerful influence on the ultimate resolution of the trauma," even without compensation payments.[167]

Remedies like changes in security procedures and changes in complaint-handling procedures can play an important role in reconstructing a plaintiff's self in relation to others. Many rape victims struggle to reconnect with society after the assault.[168] Because most perpetrators of sexual assault know their victims, the victim may feel she needs to "withdraw from some part" of her social or professional world.[169] Creating changes in those worlds through the settlement process can provide victims with a sense of reintegration into the community.[170]

B. Political Potential

As is clear from its history, rape is both a private and a public wrong. However, these very categories are problematic. Tort law involves not just a relation between plaintiffs and defendants, but also between these parties and the state. Accordingly, there is always an inherent publicness to this area of "private" law.[171] Further, private law often has a public policy dimension, rendering the distinction between private and public slippery at best, and making "[d]elineating where the private ends and the public begins . . . a notoriously challenging intellectual and practical exercise."[172] The private and the public "cannot be neatly or decisively demarcated in law, nor in other aspects of social life."[173] Simply put, "there is no 'public/private distinction.'"[174] Instead, there is

164. *Id.* at 1565, 1576.

165. *Id.* at 1576. *But see* Mary Koss, *Restoring Rape Survivors: Justice, Advocacy, and a Call to Action*, 1087 ANN. N.Y. ACAD. SCI. 206, 216 (2006) ("Because settlements are private, tort actions in the case of rape fail to achieve not only the aims of public justice, but also the prevention and community norm change goals of the antisexual assault advocacy community. Private justice fails to validate the SV among her family, friends, and community as a legitimate victim and does not express public condemnation of wrongful conduct. Additionally, private justice does not contribute to individual and general deterrence of future offenders by imposing sanctions that may outweigh any perceived benefits of criminal sexual conduct.").

166. Perry, *supra* note 128, at 987.

167. *Id.*

168. NEDELSKY, *supra* note 89, at 215.

169. *Id.*

170. *Id.*

171. Helge Dedek, *Of Rights Superstructural, Inchoate and Triangular: Some Remarks on the Role of Rights in Blackstone's Commentaries*, *in* RIGHTS AND PRIVATE LAW 186 (Donal Nolan & Andrew Robertson eds., 2011).

172. Randall, *supra* note 104, at 455.

173. *Id.*

174. Karl Klare, *The Public-Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1361 (1982) (discussing the absence of a true distinction between public and private in labor law), *quoted in* Ruth Gavison, *Feminism and the Private/Public Distinction*, 45 STAN. L. REV. 1, 11 n.25 (1992).

only "a series of ways of thinking about public and private that are constantly undergoing revision, reformulation and refinement."[175] The false distinction mainly serves as a form of political rhetoric, one whose "social function . . . is to repress aspirations for alternative political arrangements by predisposing us to regard comprehensive alternatives to the established order as absurd."[176] The public/private distinction is perhaps best understood then "as an ideological marker that shifts in relation to the role of the state at particular historical moments, in particular contexts and in relation to particular issues."[177]

Issues of gender and sexuality have long been situated in the nodal realm between public and private, and arguments that certain wrongs are public and other wrongs are private have had particular political consequences, some positive and some negative. For example, domestic abuse and marital rape persisted unchecked for so long partly because they were labeled as private.[178] Categorizing them in this manner hid the connection between them and the broader social world.[179] On the other hand, adultery has often been pulled into the public world, and when it has been, it has typically attracted severe punishment and has not affected gender equality in a positive manner.[180]

The net result of emphasizing rape as a "public" wrong that should be addressed within the criminal law system has been that most rapes go unreported, uninvestigated, and unredressed. Reasserting that sexual assault is also a private law wrong that can be appropriately addressed in the tort system may be able to change the reality. Ironically, using private law in this manner may affect the existence of rape as a public wrong in another important sense. Rape is a public wrong in that it is the kind of wrong that reflects a particular structural inequality deeply embedded in society generally. It is "the kind of wrong that would not and could not be committed but for the fact that the community in which they occur is affected by a particular kind of character flaw, such as being [. . .] patriarchal in character."[181] In order to fix this kind of public

175. Randall, *supra* note 104, at 455–56.

176. Klare, *supra* note 174, at 1361, *quoted in* Gavison, *supra* note 174, at 11 n.25.

177. Susan Boyd, *Challenging the Public/Private Divide: An Overview*, *in* CHALLENGING THE PUBLIC/PRIVATE DIVIDE: FEMINISM, LAW AND PUBLIC POLICY 3–4 (1997), *quoted in* Randall, *supra* note 104, at 455–56.

178. *See* Jane Aiken & Katherine Goldwasser, *The Perils of Empowerment*, 20 CORNELL J. L. & PUB. POL'Y 144 (2010).

179. *See id.*

180. *See, e.g.*, BRUNDAGE, *supra* note 17, at 388 (describing punishments of adulterous women in the eleventh century that included shaving their heads, parading them publicly with torn clothes, and whipping them publicly).

181. Michelle Madden Dempsey, *Public Wrongs and the "Criminal Law's Business": When Victims Won't Share*, *in* CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF 269 (2011). Here, patriarchy appears to mean men's domination of women. Regardless of terminology, there is an inverse relationship between gender equality and rape: societies that have high instances of sexual assault tend to have less gender equality. Further, societies in which women have low status are typically plagued with poverty and other social problems. *See generally* NICHOLAS D. KRISTOF & SHERYL WUDUNN, HALF THE SKY: TURNING

wrong, the community itself must be changed.

1. The Triangulated Claim as Crimtort

While public law is the most obvious way to get at public harms and effect changes in a community, private law can also serve this purpose. So-called "crimtorts" are a good example of private law serving a public purpose. Crimtorts enable "private litigants [to] serve the public good when they 'expose and financially punish entities that commit torts causing 'group injuries,' that are not rectified on the criminal side of the docket.'"[182] In this way, crimtorts represent "the expanding middle ground between criminal law and tort," and "the synergistic combination of public and private law purposes" that occur at this nexus.[183] They arm ordinary citizens "with the power to return society to equilibrium,"[184] rather than placing that power in the hands of a government prosecutor. Here, the plaintiff acts as a "private attorney general who seeks civil recourse but also fulfills a broader purpose of identifying and punishing reckless corporate defendants."[185] It is a bottom-up approach, rather than a top-down one.[186]

Civil actions for abuse in nursing homes serve as a helpful illustration of a triangulated crimtort, as do the civil actions for child sexual abuse by members of the clergy.[187] In both of these examples, a traditionally vulnerable group was able to use private law to effect widespread systemic change. In the nursing home context, elderly residents "suffered catastrophic injury that was the functional equivalent of manslaughter."[188] The homes represented a threat to public safety, as well as obviously perpetrating private wrongs upon those that relied on their services.[189] Civil actions against these homes revealed their harmful practices, and the homes changed their protocols as a result.[190] Now, nursing homes have a recognized "obligation to use reasonable care to protect their patients from foreseeable sexual assaults."[191] The child sexual abuse cases in the Catholic Church reflect a similar pattern. As Timothy Lytton describes,

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OPPRESSION INTO OPPORTUNITY FOR WOMEN WORLDWIDE (2009) (discussing the global struggle for women's equality).

182. Michael Rustad, *Torts as Public Wrongs*, 38 PEPP. L. REV. 433, 525–26 (2011) (quoting Thomas Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 WIDENER L.J. 733, 735 (2008)).

183. Rustad, *supra* note 182, at 525.

184. Koenig, *supra* note 182, at 733.

185. Rustad, *supra* note 182, at 440. While Koenig and Rustad focus on punitive damages as the primary means by which public purposes can be achieved, the concept is arguably elastic enough to encompass liability itself.

186. *Id.*

187. *Id.* at 475, 526.

188. *Id.* at 527.

189. *Id.* at 527 n.600 (describing harms done to the elderly residents of nursing homes).

190. *Id.*

191. Bublick, *Tort Suits*, *supra* note 2, at 61.

clergy sexual abuse litigation resulted in increased awareness of this type of sexual abuse, revealed the high level of institutional responsibility and complicity in the abuse, and ultimately resulted in systemic policy and procedural changes that helped to protect against future abuses.[192]

By broadening the contextual frame of sexual assault, and exposing the role of third-party entities in creating realities that facilitate rape, triangulated civil claims for sexual harms can function as crimtorts. Through triangulated sexual assault claims, women can target the public and private aspects of the harm.[193] These suits show how sexual harms occur in part because institutions and corporations create the space and climate for them to happen. Moreover, these suits can create large-scale change by making institutions and corporations change those spaces and climates, and change the messages that they send regarding the acceptability of sexual assault.

2. Third Party Responsibility

a. Failing to Protect Against Rape

Prior to the 1970s, courts "did not expect anyone but the assailant or the victim to prevent the assault."[194] Since that time, however, society has begun adopting a deeper understanding of social responsibility, and multiple responsibility, for certain wrongs.[195] For instance, outside of the sexual assault context, there have been successful tort suits brought against not only the defendants who use guns to commit crimes, but also against the gun manufacturers who allow their products to be readily accessed for illegal purposes.[196] The increase in civil litigation for sexual assault generally, and in the addition of corporate or institutional third parties specifically, is linked to "the broadening understanding of social responsibility for sexual assault prevention."[197] Now, since the 2000s, many cases are "concerned with

192. TIMOTHY LYTTON, HOLDING BISHOPS ACCOUNTABLE: HOW LAWSUITS HELPED THE CATHOLIC CHURCH CONFRONT CLERGY SEXUAL ABUSE 7 (2008) (responding to criticism of tort litigation as a strategy for systemic change and victim compensation).

193. *But see* Nicola Godden, Rape and the Civil Law: An Alternative Route to Justice 52 (2009) (unpublished M.A. thesis, Durham University), *available at* http://etheses.dur.ac.uk/252 (arguing that "tort law misrepresents the nature and extent of certain harms because it frames them in terms of isolated acts against an individual").

194. Bublick, *Tort Suits*, *supra* note 2, at 60.

195. *Id*.

196. Robert Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 435–38 (discussing the court's ruling in *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802 (E.D.N.Y. 1999)).

197. Bublick, *Tort Suits*, *supra* note 2, at 60 (noting that the "sense that responsibility for sexual assaults should not be limited to criminal assailants marks a significant change in causal attribution which has considerable potential to steer tort law in an egalitarian direction"). The broader understanding of responsibility in general can also be seen in what Robert Rabin termed the "enabling torts." In these torts, manufacturers of dangerous products like guns and tobacco can be held partly responsible for the harms that their products cause. Rabin, *supra* note 196, at 438. This same trend can also be seen in the jurisprudence surrounding Title VII, under which

institutional responsibility to affect the conditions that make sexual assault prevalent and largely unsanctioned."[198]

Third parties can fail to protect against rape in a number of ways. An employer may fail to adequately vet its employees;[199] a landlord may leave apartment keys easily accessible to workers and members of the public;[200] a corporation may fail to train security personnel to properly respond to situations involving sexual assault;[201] a treatment center may fail to warn members of an alcohol treatment group that one member has a propensity towards sexual violence when drinking;[202] or a medical center may not provide adequate supervision of staff and patients.[203] Generally, entities and institutions in some ways encourage rape and sexual assaults by failing to take complaints of sexual misconduct seriously, failing to implement certain safeguards, or otherwise tolerating environments of sexual hostility. In particular, the ways that corporations and institutions respond (or do not respond) to allegations of sexual assault send important messages about its acceptability.[204] In these and other circumstances, courts have engaged in nuanced analyses of duty, foreseeability, and causation that allow for a broad consideration of how and why sexual assaults occur.

b. Reinforcing Masculinity Norms

Another way that third-party institutions and entities contribute to sexual assault is through enforcing and encouraging norms of dominant masculinity. One way of understanding rape is as a practice performed for other men. By inflicting this type of personal injury on women, men demonstrate their

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employers can be liable for the conduct of third-party harassers. *See generally* Noah Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357 (2009).

198. Bublick, *Tort Suits*, *supra* note 2, at 61.

199. Kodiak Island Borough v. Roe, 63 P.3d 1009 (Alaska 2003), *cited in* Bublick, *Tort Suits, supra* note 2, at 86.

200. Doe v. Linder Constr. Co., 845 S.W.2d 173 (Tenn. 1992), *discussed in* Bender & Lawrence, *supra* note 84.

201. Bender & Lawrence, *supra* note 84, at 86 n.200 (citing L.A.C. v. Ward Parkway Shopping Ctr., 75 S.W.3d 247 (Mo. 2002)).

202. Bryson v. Banner Health Sys., 89 P.3d 800 (2004) (holding that a substance abuse treatment facility owed a duty of care to protect a female patient from sexual assault by another patient in treatment at the facility).

203. Bublick, *Tort Suits*, *supra* note 2, at 87–88 (citing N.X. v. Cabrini Medical Ctr., 765 N.E.2d 844 (N.Y. 2002)).

204. For instance, in the wake of the Penn State child sex scandal, the actions of the University have been carefully dissected in order to distill a message of either denunciation or complicity. For instance, the termination of Coach Joe Paterno, who is alleged to have failed to act on his knowledge that a colleague sexually assaulted children, was largely understood in terms of its expressive function. A civil suit is pending against Penn State from at least one alleged victim. Bill Pennington, *Penn State Officials, Including Paterno, Could Face Civil Lawsuits*, N.Y. TIMES (Nov. 11, 2011), http://www.nytimes.com/2011/11/12/sports/ncaafootball/penn-state-officials-including-paterno-could-face-civil-lawsuits.html?_r=0.

dominance and masculinity.[205] "Masculinities are relational," and men perform masculinity because of and for other men, even when those other men are not literally present.[206]

The ways in which rape connects to masculinity and dominance is most obvious in situations where other men are actually present for the sexual assault, as in group rape or rape in war. In her historical overview of rape in the Canadian context, Constance Backhouse notes that "[g]ang rape has been an all-too-common feature of sexual assault, with groups of three or more men charged regularly in cases that span the century and stretch across the country," an insight that is echoed in research on rape in the United States.[207] Group sexual assault is a common feature of many rapes, particularly when gang members are involved.[208] As early as 1958, approximately 27% of reported rapes were group rapes, and another 16% of reported rapes were pair rape.[209]

Rapes that involve groups serve as a medium for the members of the group, a way for them to interact and perform for each other.[210] The "objective of a gang rape is to perform sexually in front of an audience;" the other men witness the performance and can therefore confirm the masculinity of the actors.[211] The father of a student at Glen Ridge High School, where four members of the football team sexually assaulted a mentally disabled girl, stated it well: "If I think back about that period, I can see the group [of high school guys] getting stronger, closer, every time they got together and humiliated a girl . . . What they enjoyed in common wasn't football. This was their shared experience. For them, this was what being a man among men was."[212]

In the context of war, group rape is part of the negative hegemonic masculinity associated with being a soldier. The "theatre of war" is one of the primary scenes of "masculinity's hegemonic performance," making it an

205. *See generally* Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J. L. & GENDER 431 (2010) (discussing the role of men's practices in constructing masculinity).

206. *Id.* at 455.

207. BACKHOUSE, *supra* note 106, at 60; Christopher Kendall, *Rape as a Violent Crime in Aid of Racketeering Activity*, 34 LAW & PSYCHOL. REV. 91, 93 (2010).

208. Kendall, supra note 207, at 93.

209. *Id*.

210. Kimberly Allen, *Guilt by (More Than) Association: The Case for Spectator Liability in Gang Rapes*, 99 GEORGETOWN L.J. 837, 839 (2011).

211. Despite the key role that the audience members play in these types of rape, "[t]he [criminal] law does not touch the group member who intentionally watches and enjoys the gang rape; indeed, even aiders and abetters who cheer on the rapists, who snap photos, or who otherwise facilitate the gang rape, are rarely held accountable. In other words, the law ignores the motivating role that 'spectators' play in gang rapes." *Id.* at 839. However, such instances are another situation where tort law may impose liability that the criminal law cannot. For example, in *Weldon v. Rivera*, 301 A.D.2d 934 (N.Y. App. Div. 2003), a co-defendant who watched and kissed the plaintiff during the assault was held liable on the theory of concerted action.

212. Allen, *supra* note 210, at 838 (quoting BERNARD LEFKOWITZ, OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB 138 (1997)).

important site for sexual domination.[213] Rape in war is a "symbolic message of dominance to the conquered (men) and to all women."[214] It binds together the soldiers doing the raping, separates them from the weaker men who have lost their women, and confirms them as more powerful than the raped women.[215] Through rape in war, men establish themselves as masculine victors.[216] Rape is endemic to war, and to the military in general.[217]

Many other institutions and corporations play a significant role in creating environments that make it more likely rape will occur. In addition to the military, rape and sexual assaults are particularly prevalent in institutions with cultures that value dominance and masculinity including policing, college football, and prison.[218] Fraternities, too, have been implicated in creating environments that condone or facilitate rape.[219]

Institutions, corporations, and other third-party entities exist within this world of normalized male violence, and they can contribute to it through policies that ignore sexual wrongs, spaces that hide violence, and procedures that fail to address sexual harms. Triangulated claims contextualize the acts of an individual within the environment and circumstances that allow those acts to occur. They expose the norm-setting role of institutions and corporations, and show how institutions and corporations can actively discourage sexual assault through different procedures and actions. By responding to sexual assault in a less tolerant way, corporations and institutions can send a message that such behavior is not appropriate, and not within the range of normal masculinity.

The recent scandal at Penn State University illustrates the role that institutions can play in sexual wrongs. According to the grand jury findings, in 2002 a graduate assistant coach witnessed a ten-year-old boy "being subjected to anal intercourse" by coach Jerry Sandusky in the shower of the locker-room.[220]

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213. Robyn Wiegman, *Unmaking: Men and Masculinity in Feminist Theory*, *in* MASCULINITY STUDIES & FEMINIST THEORY: NEW DIRECTIONS 42 (Judith Kegan Gardiner ed., 2002).

214. Maria Baaz, *Why Do Soldiers Rape? Masculinity, Violence, and Sexuality in the Armed Forces in the Congo (DRC)*, 53 INT'L STUD. Q. 495, 498 (2009).

215. *Id.*

216. *Id.*

217. Eileen Zurbriggen, *Rape, War, and the Socialization of Masculinity: Why Our Refusal to Give Up War Ensures that Rape Cannot be Eradicated*, 34 PSYCHOL. OF WOMEN Q. 538, 538 (2010).

218. For an analysis of the relationship between sexual assault and college football, see Ann Scales, *Student Gladiators and Sexual Assault: A New Analysis of Liability for Injuries Inflicted by College Athletes*, 15 MICH. J. GENDER & L. 205 (2008), and, for a discussion of rape in the prison context, see Kendall, *supra* note 207, at 97.

219. A recent news story suggests these rates are connected to overall attitudes within these institutions: a member of one fraternity circulated a survey asking others who they would like to rape. Associated Press, *Vermont: Inquiry Into Allegations of a Rape Survey*, N.Y. TIMES, Dec. 15, 2011, at A22.

220. Thirty-Third Statewide Investigating Grand Jury, Jerry Sandusky Grand Jury Report 6, 7 (2011), *available at* www.washingtonpost.com/wp-srv/sports/documents/sandusky-grand-jury-report11052011.html.

The graduate assistant did not stop the assault, but reported it to the head coach of Penn State's football team, Joe Paterno. Joe Paterno then reported the incident to his supervisor, Tim Curley, who failed to investigate the matter or report the incident to any branch of law enforcement or child protection (in possible violation of a mandatory reporting statute).[221] Tim Curley and two other university administrators were charged with perjury for allegedly lying during their grand jury testimony. Had the report been promptly and properly investigated, Sandusky's access to other children could have been limited.

College football is well known for being a homosocial environment where hegemonic masculinity abounds, and where sexual wrongs frequently happen.[222] Usually, the complainants of sexual wrongs in this context are women.[223] The fact that college football, as an institution, is associated with so many sexual harms suggests that the institution plays a significant role in these occurrences. It plays a role in constructing the hyper-masculinity that is associated with sexual violence, and, in failing to respond effectively when those sexual wrongs happen, it normalizes them.

c. Failing to Address Rape

Sexual assault, as a "form of violence" that treats another human being "as no more than a physical object," not only damages the relationship between the victim and her assailant, but can also damage the relationship between the victim and any third-party institutional actor implicated in the violation.[224] Triangulated tort actions address both of these relationships. Institutions, by their response or lack thereof to sexual assault, send messages that people receive and believe. For instance, a woman raped at Virginia Tech never returned to school there because she felt that their inaction following her complaint "signaled" to her, "as well as to the student body as a whole, that the school either did not believe her or did not view [the assaulter's] conduct as improper."[225]

The relationship between the institution and the plaintiff is important, and connects to the plaintiff's sense of selfhood. Selves are relational: the self is "constituted in an ongoing, dynamic way by the relationships through which each person interacts with others."[226] Relationships with others—from intimate familial and romantic relationships, to less intimate relationships with employers and teachers, to the "social structural relationships, such as gender, economic relations, and forms of governmental power," and relationships with other

221. *Id.* at 12.

222. Scales, *supra* note 218, at 208.

223. *See generally id*.

224. Martha Merrill Umphrey, *The Dialogics of Legal Meaning: Spectacular Trials, The Unwritten Law, and Narratives of Criminal Responsibility*, 33 L. & SOC'Y REV. 393, 396 n.5 (1999) (quoting DENNIS WRONG, POWER: ITS FORMS, BASES, AND USES (1979)).

225. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 624 (2009).

226. NEDELSKY, *supra* note 89, at 21.

institutional and corporate entities—all help "human beings become who they are."[227] As Marx famously explained, it is through "certain relations" that individuals gain their social (and economic) identities.[228] Within this schema, "law, including rights, is one of the chief mechanisms (both rhetorical and institutional) for shaping the relationships that foster or undermine values such as autonomy."[229]

Through the mechanism of a third-party civil lawsuit, the plaintiff is able to demand accountability from the entity for contributing to the harm she has suffered, or failing to adequately address her complaint. The triangulated civil action is a form of resistance to the violation of her sense of self. It is a form of *self*-defense, specifically of the sexually autonomous self, in the face of the sexual violation.[230] Moreover, it is a challenge to the structural factors that contributed to that violation.[231]

Through triangulated civil claims, female plaintiffs are able to implicate corporations, institutions, and other societal entities for their role in facilitating sexual and gendered harms. In this sense, these actions push back against the strict individualism of liberalism, and argue for a more complicated system of dynamics. In these new triangulations, women use private law for a public purpose: they show that the wrong is not solely private; the wrongs must be contextualized within the systems that give rise to them. Tort law is about "the normative relations" between members of society: "what they owe one another by way of care and how the failure to provide to others the care owed them affects the normative relations between them."[232] Corporations and institutions are a part of society's fabric, and how they treat women and sexual assault complainants affects society as a whole. Rights are relational, and should be viewed not just "in terms of the bipolar relationships of litigants but also more broadly in terms of the social context in which they arise and are given form and substance."[233] These claims help bring those dynamics into focus.

One of the side effects of keeping rape almost solely within the confines of the criminal law is that institutions have been hesitant to address sexual assault. They seem to believe that they are ill-equipped to prevent or deal with such wrongs, and that these matters are best left to the criminal system.[234] However, tort liability, or the risk of tort liability, can make this a more costly decision, and may prompt institutions to become more aggressive in their responses to rape. Further, it is likely that the deterrent effect of tort liability will result in

227. *Id.* at 4.

228. Rubin, *supra* note 35, at 87

229. NEDELSKY, *supra* note 89, at 4.

230. For a more literal take on the role of self-defense in rape, see Henderson, *supra* note 80.

231. *See generally* WOHL, *supra* note 37 (discussing gender dynamics in Greek tragedy).

232. Jules Coleman, *Mistakes, Misunderstandings, and Misalignments*, 121 YALE L.J. ONLINE 541, 551 n.19 (2012).

233. Randall, *supra* note 104, at 485.

234. *See* Scales, *supra* note 218, at 231; Carroll, *supra* note 148, at 21.

increased preventative measures.[235] Corporations and institutions "undoubtedly have realized that taking reasonable precautions to prevent rape, such as installing sturdy locks on apartment doors, is far less costly than paying a settlement or judgment to a rape victim. In turn, the increased emphasis on prevention of rape inures to the benefit of all women."[236] As the spaces, practices, and policies controlled by corporations and other entities begin to recognize and accommodate women's safety and sexual autonomy, new social norms may develop.

d. Power to Affect Society

The third-party triangulation a female plaintiff initiates opens up the legal dispute to the social context that surrounds it, and widens the frame so we can see rape and sexual assault as more than just a private wrong between two people. In this way, these suits help "bring to light the very differentials of power that structure rape:"[237]

> Tort law has made consciousness about automobile safety the responsibility of car manufacturers. Likewise, consciousness about rape prevention should be the responsibility of all men, and of all our institutions (government, business, workplaces, housing, public transportation and public accommodations, schools, families), and of our law and legal system, our educational systems, health systems and the media. We can spread this responsibility by making all citizens, male and female, legally responsible through tort damages actions for failing to take conscious and reasonable precautions against the clearly foreseeable risk of rape to women and by working as lawyers and judges to take the male biases out of the perspective of tort law.[238]

Triangulated sexual assault claims, when taken as a whole, can function like a litigation network,[239] and change the aspects of third-party entities that enable sexual assault.[240] Tort liability can have "an empowering effect on the societal level: it helps break unfair social structures, and reduces power imbalances that

235. *See, e.g.*, Andrew Popper, *In Defense of Deterrence*, 75 ALBANY L. REV. 181, 199 (2012) (explaining that tort liability for corporate misconduct results in deterrence).

236. Gail M. Ballou, *Recourse for Rape Victims: Third Party Liability*, 4 HARV. WOMEN'S L.J. 104, 109 (1981).

237. Henderson, *supra* note 80, at 239.

238. Bender & Lawrence, *supra* note 84, at 325–26.

239. *See* Byron G. Stier, *Crimtorts, Class Actions, and the Emerging Mass Tort Method*, 17 WIDENER L.J. 893, 924 (2008) (describing how mass litigation can function like a network).

240. *But see* Michal Buchhandler, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. OF GENDER & L. 147, 179 (2011) (noting that "a growing body of literature challenges the value of legal tools in producing social change, suggesting that the law provides a mechanism that is deeply limited in successfully fostering social change").

decrease individuals' opportunities to control their own lives."[241] Often, such changes come from "a pioneering and growing utilization of existing law," much like these triangulated claims.[242]

3. Individual Defendant Responsibility

Triangulated civil claims also target social norms at a more micro-level, on the plane of the individual defendant. In keeping with the fact that most sexual assaults are committed by people the victim knows, "a large number of these tort cases stem from date or acquaintance rape," a circumstance that has proven very challenging for the criminal law.[243] Within the civil litigation context, individual defendants may be deterred from non-consensual sex through learning more about their victims' experiences. For example, in the infamous Kobe Bryant case, he issued a public apology shortly after the criminal sexual assault charges were dismissed, but while the civil suit was pending. After apologizing "directly to the young woman involved in this incident" for his "behavior that night and for the consequences she has suffered in the past year," he stated:

> Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did. After months of reviewing discovery, listening to her attorney, and even her testimony in person, I now understand how she feels that she did not consent to this encounter.[244]

While obviously not every case will achieve such a result, there is a potential for the civil process to facilitate communications that educate and change a defendant's view of what a consensual sexual encounter looks like. It appears that in many triangulated claims, the plaintiff and the individual defendant reach a settlement through discussion and negotiation, often early in the case.[245] It is difficult to draw conclusions from this fact, but it does mean that the conversation would generally take a different form than the typical "he said, she said" so often associated with the criminal sexual assault trial, and could instead lead defendants to more nuanced understandings of consent in the sexual context.

4. The Role of the State

Tort law is not only about the obligations that those existing in society owe to one another. It is also about "political morality, the obligations of the state to

241. Perry, *supra* note 128, at 966.

242. *Id.* at 967.

243. Bublick, *Tort Suits*, *supra* note 2, at 66.

244. Andrew E. Taslitz, *Wilfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 384 (2005).

245. Bublick, *Tort Suits*, *supra* note 2, at 70.

its citizens, and the limits of citizens' claims on the coercive power of the state."[246] Specifically, it is about the harmed person's "right to have the state's assistance in holding a wrongdoer accountable, or responsible, for what he did."[247] Courts, as agents of the state, consider themselves politically obligated "to empower the plaintiff to act in some manner against the defendant," and they fulfill this obligation by allowing the plaintiff to, under certain legal circumstances, "exact damages or have the defendant enjoined against performing certain acts."[248] Empowering plaintiffs to bring actions against those that wrong them is "part of the state's treating individuals with respect and respecting their equality with others."[249]

The empowerment that the state provides in the tort context is particularly important when contrasted with the disempowerment that complainants experience in the criminal context of rape. The state, after all, is gendered. It exists within a specific gender system, and has an interest and role in perpetuating that system.[250] In this way, it is structurally constrained, and "unlikely to create laws or policies that transcend or fundamentally challenge existing gender relations."[251] But, as part of the social contract, it is obligated to provide some means by which a wrong as egregious as sexual assault can be remedied. According to social contract theory, "people agree to enter into a civilized legal society with the understanding that, though they are giving the state a monopoly on violence, there are adequate systems in place as a substitute for remedying wrongs."[252] The criminal justice system has failed to provide adequate redress for many victims of sexual assault, and "[i]f a state fails to punish enough offenders, at least if their offences are relatively serious, many people think it has breached a duty that it owes the victim or to its citizens more generally. Some even believe that it may have violated their human rights."[253]

However, in the civil action, the state offers an avenue of redress that

246. Jason Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749, 1808 (2007).

247. John Goldberg & Benjamin Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 983 (2010).

248. *Id.* at 974.

249. *Id.* Beyond the state's moral obligation to provide redress, some form of redress may be legally required under the 14th Amendment's Due Process Clause. *See generally* John Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE. L.J. 524 (2005) (arguing for recognition of a right, grounded in the Fourteenth Amendment's Due Process Clause, to a body of law that empowers individuals to seek redress against persons who have wronged them).

250. Marshall, *supra* note 73, at 105.

251. *Id.*

252. Solomon, *supra* note 246, at 1794.

253. VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW 85 (2011). Indeed, the state arguably can become a source of persecution, "either directly or by abetting (and thus becoming responsible for) private discrimination by throwing in its lot with the deeds or by providing protection so ineffectual that it becomes a sensible inference that the government sponsors the misconduct." Sarhan v. Holder, 658 F.3d 649, 657 (7th Cir. 2011) (quoting Hor v. Gonzalez, 400 F.3d 482, 485 (7th Cir. 2005)).

mitigates against its failing on the criminal front. Federal, state, and municipal agencies have recently suggested that rape survivors should consider using civil recourse.[254] In fact, the United States Department of Justice now "distributes a publication that 'encourages victim consideration of civil remedies.'"[255] Through the private system of tort law, the state offers one way of fulfilling the social contract and provides a legal substitute for private vengeance for sexual wrongs.

Perhaps unintentionally, the state-sanctioned civil adjudication of rape actually "embodies and furthers several related liberal-democratic values," in ways that may support the feminist project more broadly.[256] First, in "multiple ways, it affirms the significance of the individual citizen," the female plaintiff, seeking redress for the wrong that has been done to her.[257] It offers a means of protecting her interests by imposing a duty on individual and institutional defendants to neither commit nor facilitate sexual assault.[258] Further:

> It enables individuals to assert claims as a matter of right without first obtaining the permission or blessing of government officials. It renders wrongdoers specifically answerable to victims rather than to a government prosecutor acting on behalf of the state or the people. In holding individuals accountable based on what they have done, irrespective (in principle) of who they are, it embodies and reinforces a notion of democratic equality – the idea that there is not a class or group of persons who are somehow entitled to mistreat another, "lower" class or group.[259]

Women have traditionally occupied the status of a lower class or group, and the prevalence of rape and sexual assault suggests that some vestiges of the previous patriarchal order still exist. Through private tort law, the state empowers women to demand equal status in society. Moreover, the price of that kind of empowerment comes at a much lower cost than the price of protection through the criminal law. Reliance on the institutional protection of the state in either a civil or criminal proceeding has a "dual price" to the victim: the price of dependence upon that institution and the price of "agreement to abide by the protector's rules."[260] Any resort to the court system requires dependence upon the institution of the state, but in the criminal context, the victim must also accede to the prosecutor's decision to initiate criminal proceedings. In the civil context, the only rules that the victim must abide by are civil procedure rules and

254. Lininger, *supra* note 11, at 1603.
255. *Id.*
256. Goldberg & Zipursky, *Torts as Wrongs*, *supra* note 247, at 981.
257. *Id.*
258. *Id.*
259. *Id.* at 981–82.
260. Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUD. 7, 8 (1992).

tort law generally, and the victim need only depend upon the institution of the state to permit her participation.

V.
OBSTACLES FOR CIVIL TRIANGULATION

Assigning part of the responsibility for sexual harms to the third parties that facilitate or fail to prevent rape is a promising way to eventually enlist them in the project of gender equality. As they become compelled, through tort liability and deterrence, to create safer spaces and hostile-free environments, gender equality will likely increase. There are, however, some obstacles that could impede the development of this area of law. Cultural and legal pressures continue to push women into the criminal justice system as the sole means of redress. These pressures include the use of summary judgment as a means of dismissing these cases prior to jury involvement, persistent rape myths in comparative fault doctrines, gendered ideas of revenge, the connection between credibility and commodification, and general access to justice issues. Each of these issues must be overcome in order for triangulated civil claims to have their transformative effect.

A. Summary Judgment Bars

The doctrines that govern third-party liability for sexual harm have not been firmly established. It is difficult to pull out any clear principles from the case law, as many of the findings and holdings have been contradictory.[261] Usually, the rules of negligence hold that there is "no duty to take reasonable care to protect others from crime."[262] However, if there is a special relationship between the third party and the plaintiff or defendant, or if the third party has increased the danger of a situation, then a third party's general duty of care "may include the duty to take reasonable care to protect others from foreseeable criminal victimization."[263]

As this formulation of the legal question suggests, the issue of intervening criminal acts is now addressed under the heading of duty, rather than proximate cause.[264] The past general rule was that intervening criminal conduct broke the chain of causation, but currently courts are "far less likely to rely on proximate cause and to rule that the sexual assault or other criminal act severs the causal chain. Instead, the fight is now over duty with no clear direction in the case law."[265] For example, in *Bryson v. Banner Health System*, the Supreme Court of

261. Chamallas, *supra* note 6, at 1373.

262. Ellen Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1420 (1999) [hereinafter Bublick, *Citizen No-Duty*].

263. *Id.* at 1420–21. Some cases also proceed on a *respondeat superior* basis. *See, e.g.*, Doe v. Sipper, 821 F. Supp. 2d. 384 (2011).

264. Chamallas, *supra* note 6, at 1374.

265. *Id.*

Alaska considered whether an alcohol treatment center had a duty to warn a patient of another patient's propensity for sexual violence when drinking.[266] The treatment center assigned individuals to a group, and encouraged group members to contact each other outside of the group. When one group member was sexually assaulted by another, she brought an action against the treatment center alleging that they had a duty to warn her about her assaulter's history. The Supreme Court affirmed the lower court's view that in those circumstances, there could be such a duty.

However, duty, as a concept, "is an output not an input."[267] It is "a shorthand statement of a conclusion, rather than an aid to analysis in itself."[268] Policy factors are part of the analysis; duty is merely "an expression of the sum total of those considerations of policy which lead the way to say that the particular plaintiff is entitled to protection."[269] Because of this, the question of whether a third party owes a duty to the plaintiff in these triangulated sexual assault cases cuts along political lines.

Where the duty line falls can help or hinder social justice goals.[270] Conservative courts, which tend to be pro-institutional defendant, often apply no-duty rules on summary judgment to "cut off liability before the claims reach the jury."[271] These decisions seem to be motivated by "a policy judgment that institutional defendants should not be held accountable, despite the foreseeability of the attacks. In support of this view, restrictive courts tend to conceptualize the problem as one of 'random crime,' rather than a systemic problem of high rates of rape and sexual assault which disparately affect women and other vulnerable groups."[272] They often frame rape as an "unlikely event that cannot be foreseen unless committed by the same person in exactly the same situation just before."[273]

An example of this can be seen in a recent case of college rape. The complainant was a hearing-impaired freshman. At orientation for her dorm, the resident advisors told the students that the dorm had an "open door" policy, and then, as a group, the students went outside and each chose a large rock to use to prop their doors open. One night, while her door was propped open with the

266. Bryson v. Banner Health System, 89 P.3d 800, 800 (Alaska 2004).

267. PETER GERHART, TORT LAW AND SOCIAL MORALITY xv (2010).

268. Michael Rustad & Thomas Koenig, *Taming the Tort Monster: The American Civil Jury System as a Battleground of Social Theory*, 68 BROOK. L. REV. 1, 44 (2002) (quoting Dillon v. Legg, 441 P.2d 912 (Cal. 1968), quoting WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 53 (3d ed. 1964)).

269. Rustad & Koenig, *supra* note 268, at 42–43 (quoting RESTATEMENT (SECOND) OF TORTS § 314 (1965)).

270. Michael Rustad and Thomas Koenig note that "[c]ourts will modify duties of care to achieve social justice," but courts will also modify it in ways that achieve other ends. Rustad & Koenig, *supra* note 268, at 45.

271. Chamallas, *supra* note 6, at 1354.

272. *Id.* at 1379.

273. Bublick, *Tort Suits*, *supra* note 2, at 85.

rock, the complainant alleged she was sexually attacked by two men who were unfamiliar to her, but who were wearing the school sweatshirt, which led her to believe they were students at the school. The court dismissed on summary judgment, holding that since most of the previous sexual assaults on campus were acquaintance rape, there was no breach of duty.[274]

Liberal courts, on the other hand, generally tend to endorse pro-plaintiff tort law.[275] Such courts have framed rape as "a foreseeable fact of modern life,"[276] and therefore often find a potential duty and allow the case to proceed to the jury, leaving the jury "to decide whether the defendants acted reasonably under the circumstances."[277]

The Restatement (Third) of Torts warns against dismissing cases at this early stage in the judicial process and suggests that the proper decision point for these cases is in the jury room.[278] It argues that "determinations of no breach" at the summary judgment stage wrongly pretermits jury consideration.[279] The Restatement's caution "is designed to discourage courts from granting and upholding summary judgments simply by indicating that the attack in question was unforeseeable."[280] The warning "'requires judges to recognize and acknowledge that they are deciding a matter ordinarily left to the jury' and thus 'imposes an appropriate psychological hurdle for a judge before so ruling.'"[281] The purpose of this warning is to "encourage judicial restraint and transparency and to underscore that judicial rulings on duty constitute 'an incursion on the role of the jury as fact-finder and as the repository of common sense normative wisdom in individual cases.'"[282]

Although it warns against disposing of the case on summary judgment, the Restatement leaves some space for courts to prevent these triangulated civil claims from going to the jury.[283] For instance, courts can make rulings that "the specific precautions taken by defendants were adequate as a matter of law (i.e. no breach of duty) or for lack of causation. Additionally, courts are authorized to

274. Lees v. Carthage Coll., No. 10–C–86, 2011 WL 3844115, at *5–7 (E.D. Wis. Aug. 29, 2011).

275. *See* Stephen Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DEPAUL L. REV. 455, 455 (1999) (discussing the turnabout in the California Supreme Court after liberal Democrats were generally replaced with moderate or conservative Republicans).

276. Bublick, *Tort Suits*, *supra* note 2, at 85.

277. Chamallas, *supra* note 6, at 1354.

278. For a critique of the Restatement (Third)'s position on what Professor Robert Rabin termed "enabling torts," see John C.P. Goldberg & Benjamin Zipursky, *Intervening Wrongdoing in Tort: The Restatement (Third)'s Unfortunate Embrace of Negligence Enabling*, 44 WAKE FOREST L. REV. 1211 (2009).

279. Chamallas, *supra* note 6, at 1380.

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

make a policy exception from the duty to exercise reasonable care in 'exceptional cases.'"[284]

Part of the problem with disposing of triangulated civil claims on summary judgment is that these kinds of cases involve "culturally polarized understandings of fact."[285] These cases involve a group traditionally vulnerable to sexual assault, and concern questions about the "level of protection required by law when vulnerable groups are disproportionately exposed to injuries and risk."[286] Women, as members of a group particularly vulnerable to sexual assault, and men, who are less likely to be victims of sexual assault, can have very different cultural understandings of factual scenarios involving sexual assault.[287] In such cases, the diversity of viewpoints provided by a jury may be necessary to provide a balanced analysis of the facts at issue.[288]

B. Persistent Rape Myths

In addition to summary judgment concerns, rape myths pose a problem for triangulated civil claims. Rape myths have greatly affected criminal prosecutions for sexual assault, and they unfortunately also play a role in civil litigation. Indeed, some academics have questioned whether the gender biases that have infected criminal rape law will thwart the civil law as well.[289] However, the lower burden of proof in the civil context, and the lower stakes of civil litigation (compensation versus incarceration) may help blunt the effect of these myths. In the criminal context, the complaining witness must have enough credibility to meet the "beyond a reasonable doubt" standard, and if the jury finds such credibility, the accused will likely be imprisoned. In the civil context, though, the complainant only needs to meet the "balance of probabilities" standard: "the victim's story needs to be only slightly more credible than the aggressor's to prevail."[290] Moreover, the consequences of finding a plaintiff more credible than a defendant are not as severe in the civil court, as it will lead to compensation, not incarceration.

1. Comparative Fault Rules

A common trope in criminal rape prosecutions is that the female victim somehow brought rape upon herself through her actions and behavior. Female

284. *Id.*

285. *Id.* at 1398.

286. *Id.* at 1372.

287. *Id.* ("Getting to the jury in such cases increases the chances that 'someone like them' will have a role in decision making and that diverse perspectives in controversial contexts will not be excluded.").

288. For an analysis of the relationship between gender and summary judgment in the federal courts, see Elizabeth Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007).

289. Godden, *Claims in Torts for Rape*, *supra* note 119, at 180–81.

290. Perry, *supra* note 128, at 988.

plaintiffs in triangulated civil claims may have to respond to a similar accusation. Third-party defendants may use the doctrine of comparative fault, which focuses on the complainant's actions and behavior, to argue that the female complainant's actions were "a legal cause of her rape."[291] This is a privilege unique to the third party; in a two-party case, defendants are generally not able, as a matter of law, to assert such a claim against the plaintiff.[292] In triangulated civil claims, however, the comparative fault doctrine has forced courts to consider issues like "whether a rape victim who sues a hotel for negligently failing to provide reasonable security should have her damages reduced because of her own 'unreasonable' failure to protect herself against the risk of rape."[293] These kinds of inquiries take a distinctive form in the sexual assault cases, as courts demonstrate "a greater willingness to scrutinize the victim's behavior than in non-sexual criminal assault cases."[294] In this way, comparative fault defenses mimic the focus on the victim that is prevalent in criminal prosecutions of rape.[295]

Arguing against comparative fault in this context, Ellen Bublick has persuasively advocated for a "no-duty" rule to apply in these cases. Bublick argues that comparative fault defenses in the sexual assault context should be prohibited on the basis of a citizen entitlement (akin to a right): "a citizen should be entitled to shape her life around the assumption that others will not intentionally rape her."[296] She should not have to offer her liberty in exchange for the protection of tort law.[297] Rather, this liberty should be part of what third-party liability protects.[298] So far, this approach has been mentioned favorably in the Restatement (Third) of Torts, and a no-duty rule has been adopted in cases involving sexual harms to children.[299] Given the persuasiveness of Bublick's argument and the recommendations of the Restatement (Third), comparative fault may in the future become more circumscribed.

2. Gendered Notions of Revenge

There are differing cultural expectations surrounding men, women, and the appropriate legal (or extra-legal) redress for sexual harms. Men have historically

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291. Bublick, *Citizen No-Duty*, *supra* note 262, at 1415 (citing as examples Wassell v. Adams, 865 F.2d 849, 852, 856 (7th Cir. 1989) and Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So. 2d 70, 71 (La. Ct. App. 1989)).

292. Bublick, *Citizen No-Duty*, *supra* note 262, at 1415 ("While most jurisdictions do not allow rapists themselves to raise rape victim comparative fault defenses (though a very small and possibly growing minority of jurisdictions may), these same jurisdictions allow negligent third parties like hotels and landlords to raise virtually unlimited defenses of rape victim 'fault.'").

293. Chamallas, *supra* note 6, at 1355.

294. *Id.*

295. Bublick, *Citizen No-Duty*, *supra* note 262, at 1433–44.

296. *Id.* at 1416.

297. *Id.*

298. *Id.*

299. Chamallas, *supra* note 6, at 1385.

had the right, and indeed almost the obligation, "to avenge sexual humiliation."[300] In the prototypical situation, a man was humiliated when another man had sex with his wife: "one's woman in the arms of another man" has been "the ultimate nightmare."[301] While law was meant to channel private vengeful action into legal order, many ancient legal regimes allowed a husband to avenge adultery through violence, usually "by killing his wife and her lover, especially if he caught them in the act."[302] Although some later legal codes discouraged this kind of private action, in many times and places, including many American states in the nineteenth century, there was an 'unwritten law' that a man could kill his wife's lover, even if the law technically prohibited it.[303]

This 'unwritten law' was justified on two bases. First, in states where adultery was not criminalized, a cuckolded man's only legal recourse was in the civil courts, and, according to the argument, the harm done was so grievous that it was beyond price: the "jingling of the guinea" could not assuage the "hurt that honor feels."[304] Second, reliance on the law was itself seen as emasculating. Men who killed their wives' lovers argued that such action was almost an obligatory part of being a man, and that "a man who turned to the law" to respond to such a humiliation was "unmanly and effeminate."[305] Instead of following the laws of the land, "men's actions were governed by a 'higher law' that allowed, even required, vengeance in spite of its formal legal prohibition as intentional murder."[306] According to this argument, men were justified in seeking vengeance on their own, rather than agreeing to be subject to laws that would either allow them to seek civil remedy, or try to pursue prosecutions (in states where adultery was criminalized).

Historical cultural expectations of women were nearly the opposite. Under this set of beliefs, "the reluctance to hurt" was "the mark of the good woman."[307] When their husbands committed adultery, women were expected to accept this as simply part of marriage, and to seek neither legal nor extra-legal remedy. Similarly, women who experienced sexual assault and forced sex were expected to not pursue matters themselves, but to rely exclusively on the criminal law as the sole means of redress, leaving the ability to seek vengeance in the hands of the prosecutor.

Nineteenth-century American jurisprudence discouraged victims from

300. Umphrey, *supra* note 224, at 404.

301. GILLIGAN, *supra* note 41, at 53.

302. LINDA HIRSHMAN & JANE LARSON, HARD BARGAINS: THE POLITICS OF SEX 33 (1998).

303. Umphrey, *supra* note 224, at 406.

304. *Id.* (quoting Thomas J. Kernan, *The Jurisprudence of Lawlessness*, 29 A.B.A. REP. 450, 459 (1906)).

305. Umphrey, *supra* note 224, at 407 (quoting Robert W. Ireland, *The Libertine Must Die: Sexual Dishonor and the Unwritten Law in the Nineteenth-Century United States*, 23 J. SOC. HIST. 27, 30 (1989)).

306. Umphrey, *supra* note 224, at 407.

307. GILLIGAN, *supra* note 41, at 193.

pursuing private law remedies arising from acts that crossed the crime/tort divide.[308] Punishment, rather than compensation, was the preferred cultural answer to these kinds of wrongs. The belief was that a woman's civic duty required her to pursue public law remedies before she could turn to private law. Legal doctrines, like the merger doctrine that required the filing of a criminal complaint as a prerequisite to seeking private law remedies, embodied this belief.[309] Through this framing of her obligations, the law subordinated women's private interests to the public interest, resulting in victims having little control over the legal consequences of the sexual harm they experienced.[310] Any desire for revenge or vindication was to be sublimated to the criminal law.

Making a civil claim often involves an element of revenge or desire for vindication.[311] Harmed plaintiffs want to right a perceived wrong and want the law to rebalance the scales in a way that expressively indicates that the defendants must make recompense or amends, to restore some sort of equality between the two parties.[312] The act of bringing a legal claim is a refusal to accept the wrong that has been done; it is a "retaliation against" those that perpetrate harms.[313]

Female plaintiffs who have employed private law as a means of redress have historically faced difficulties. For example, in the late nineteenth century, once women were able to bring suits for the tort of seduction, those that did faced arguments that they were initiating these suits as an inappropriate form of revenge. Another argument was that the torts represented public wrongs, and that private law actions in tort were therefore inappropriate to address them.[314] Indeed, in the 1920s, many of the stereotypical figures seen in current rape myths emerged: the golddigger, the seductress, and the blackmailing woman "appeared in academic debate as well as popular culture."[315]

As is implied in these stereotypes, in addition to arguments rooted in allegations of inappropriate revenge, female plaintiffs also faced objections to monetizing sexual harms. During the 1930s, as more and more female plaintiffs began to bring seduction actions and similar claims, detractors argued that placing a money value on a sexual injury was inappropriate, and that "compensation for reputation and emotional distress commercialized couples' engagements and provided undue incentives for its exploitation by scheming women."[316] Others argued that money was an inappropriate remedy because it

308. VanderVelde, *supra* note 45, at 847.

309. *Id.* at 847–48.

310. *Id.*

311. Adjin-Tettey, *supra* note 77, at 9.

312. Sherwin, *supra* note 46, at 1389.

313. *Id.*

314. Murray, *supra* note 58, at 12, 14–15.

315. HIRSHMAN & LARSON, *supra* note 302, at 165.

316. VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 136 (2005) (noting that this was in essence a "hostile worlds" argument (i.e. that intimacy and sex should be kept separate from the

was not a strong enough deterrent for wealthy defendants.[317] Still others asserted that money was an inappropriate remedy for seduction, because "money damages for the loss of a young woman's virtue veered uncomfortably close to prostitution."[318] The stereotypes of vindictive women and the arguments regarding monetizing sexual harms were effective, and "once affection ceased to be conceptualized as a commodity belonging to men, legislatures passed anti-heartbalm statutes that eliminated the [heartbalm] torts altogether."[319] As of 2003, thirty-nine states had abolished the tort of seduction and related torts.[320]

The history of these mostly-dead torts suggests that torts that originally protected a male proprietary interest in female sexuality, and then were repurposed to protect women's interests in their own sexuality, will have to overcome a number of negative stereotypes and commodification arguments. Indeed, arguments and pressures based in stereotypes of vindictive women and commodification still surround rape law.

3. Credibility versus Commodification

To be a successful avenue of recourse for sexual harms, civil claims must overcome two connected myths. The first is the myth that women lie about rape. The second is that seeking compensation for sexual assault commodifies sex. The persistent and pervasive myth that women lie about rape has been deeply embedded in the culture for hundreds of years. Indeed, well into the 1970s,[321] many judges used to read Matthew Hale's infamous seventeenth-century statement aloud to the jury: rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[322] Unfortunately, this idea still has traction even in the current era.[323] For instance, United States rape crisis centers recently reported that in 17 states, adult rape complainants were required to undergo a polygraph before charges

world of money)).

317. Murray, *supra* note 58, at 15.

318. *Id.*

319. Rachel Moran, *Law and Emotion, Love and Hate*, 11 J. CONTEMP. LEGAL ISSUES 747, 748 (2000).

320. ZELIZER, *supra* note 316, at 136.

321. Antony E. Simpson, *The "Blackmail Myth" and the Prosecution of Rape and Its Attempt in 18th Century London: The Creation of a Legal Tradition*, 77 J. CRIM. L. & CRIMINOLOGY 101, 108 (1986).

322. Phillip N.S. Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 128, 128 (2006). Interestingly, though Matthew Hale was unwilling to find men guilty of rape based on "accusations easily made," he used accusations to sentence women accused of witchcraft to their deaths. Melinda Mawson, *Whores, Witches and the Lore: Rape and Witchcraft, Legal and Literary Intersections*, 12 AUSTL. FEMINIST L.J. 41, 43 (1999).

323. For instance, an article published in 2000 argues that "the belief that women lie about rape is no more than a 'Bayesian' conclusion based on empirical evidence, and is not a product of sexism." Gruber, *supra* note 12, at 598 (referring to Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947, 948–49 (2000)).

would be issued, and in 11 states, children were required to do the same.[324]

Despite the demonstrated reality that rape is actually very difficult to prove criminally, and the conviction rate for it is very low, this rape myth has enjoyed remarkable persistence, and "[t]he cultural trope of the woman who lies about rape is seen everywhere from the Bible to great works of American literature."[325] This "deep-rooted skepticism about the credibility of female accusers" continues to affect women complaining of sexual assault.[326]

The "false accuser" becomes even more salient when the accused seeks compensation for her injuries. Women who are raped or sexually assaulted experience a spectrum of physical, social, emotional, and financial harms.[327] A victim's health, "housing, schooling, privacy, employment, immigration status, and basic long-term financial welfare" can all be negatively affected.[328] Victims can expect hospital bills, therapy bills, lost tuition, and lost wages to create added expenses resulting from the assault.[329] Further, they will often experience "physical injury, mental health consequences such as depression, anxiety, low self-esteem, and suicide attempts, and other health consequences such as gastrointestinal disorders, substance abuse, sexually transmitted diseases, and gynecological or pregnancy complications. These consequences can lead to hospitalization, disability, or death."[330] In fact, the United States Department of Justice has estimated that these kinds of out-of-pocket expenses add up to approximately $7.5 billion per year, and when the estimated loss of quality of life and pain and suffering associated with sexual assaults are added to that figure, it jumps to $127 billion.[331] In fact, "rape is second only to arson in terms of the cost per victimization."[332] Some estimates place the societal cost of each rape at $1.3 million.[333] Even with the recent increase in civil litigation, "very few victims ever recoup those losses."[334]

Despite the costs associated with sexual assault, the criminal justice system and the general culture view attempts to recoup these losses as suspicious. This

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324. Koss, *supra* note 165, at 211.

325. Orenstein, *supra* note 130, at 1587.

326. Larson, *supra* note 16, at 447.

327. Catherine A. Carroll, *Addressing the Civil Legal Needs of Sexual-Assault Victims*, 58 WASH. ST. B. NEWS 21, 21 (2004) (noting that one incident of sexual assault can destabilize a woman's long-term financial welfare).

328. *Id.*

329. *Id.*

330. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2010).

331. Koss, *supra* note 165, at 215.

332. Matsudaira & Owens, *supra* note 100, at 2.

333. *Id.*

334. Carroll, *supra* note 327, at 22. The increase in civil litigation still represents a very small percentage of sexual assault harms: it is estimated that "fewer than 10 percent of rape survivors file civil claims." Lininger, *supra* note 11, at 1615.

suspicion reflects a cultural tension between commodification and sex. Commodification and sex have long been a point of contention in culture, as reflected in the ongoing debates surrounding prostitution.[335] Whenever sex and money get too close, the specter of prostitution appears, and prostitution is culturally associated with being "unrapeable" and not credible. The connection between prostitution and credibility can occur even in modern courts, where many "admit evidence of prostitution as a crime bearing on credibility."[336] Seeking civil compensation for sexual assault exposes the rape victim to a similar attack on her credibility.

Equating compensation for sexual assault with commodifying sex is premised on a belief that before compensation is sought, sexual assault has little connection to money.[337] However, as the cost of victimization shows, sexual assault has an inherent economic aspect that exists whether the case is litigated or not. Implying that plaintiffs make sexual assault an economic issue is based upon a very narrow view that ignores the already-existing economic consequences of the wrong. Further, when one recalls that historically, there was little cultural difficulty with allowing men to blatantly commodify women's sexuality in lawsuits, the gendered nature of this bias becomes apparent.

In the criminal justice system, an evidentiary rule that allows women to be impeached because they have also brought a civil suit reinforces the idea that credibility and commodification are incompatible. Complainants are taught that there is a credibility-commodification trade-off, and if they want to be believed in the criminal court, they must not try to seek monetary compensation.[338] They are told that "'forswearing any interest in civil damages is the price they must pay to establish their own credibility' as accusers in criminal prosecutions."[339] If they do pursue financial compensation, they will be cross-examined on it, and defense attorneys will use this information to show that they have corrupt motives and are lying in order to extract money from an unwitting man.[340] The complainants will face "scathing impeachment . . . based on their parallel civil

335. *See* MARGARET RADIN, CONTESTED COMMODITIES 132–36 (1996).

336. Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1860 (2008). *See also* Karin S. Portlock, *Status on Trial: The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404, 1405–06, 1410 (2007) (stating that in the 1920s, some courts refused to admit evidence of prostitution for the purpose of bearing on credibility, but by the 1970s, an increasing number of courts had adopted this practice).

337. This type of belief can be seen in *United States v. Morrison*, 529 U.S. 598 (2000). The Court stated, "Gender-motivated crimes of violence are not, in any sense of the phrase, economic activity." *Morrison*, 529 U.S. at 606.

338. Lininger, *supra* note 11, at 1565.

339. *Id.* (quoting Brian Dickerson, *Rape Victims Rarely Sue – Cost Too High*, DETROIT FREE PRESS, May 17, 2000, at 1B.)

340. *See* Mitchell, *supra* note 49, at 129 (quoting California Supreme Court Justice Armand Arabian as saying, "[d]espite the changes [in society], . . . a rape victim still faces the idea that 'she is of corrupt motive' and 'driven by financial gain'").

claims,"[341] and may face questions like "And you sued [the accused] trying to get money through this rape story of yours, haven't you?" and "[Y]ou are going to take [the accused] for all he's worth?"[342] The common stereotype of the "lying, conniving accused—a so-called victim—who plans to use the threat of criminal sanction and publicity to extort a civil settlement from an innocent accused plays right into rape myths," and plays "particularly well when the accused is rich and famous."[343]

Impeaching on the basis of a concurrent civil suit is not common in other types of cases: it would be strange for a person injured in an automobile accident to be impeached in a criminal suit on the basis of a concurrent civil suit.[344] Nevertheless, almost all of the courts that have considered the question of whether a civil suit bears on the credibility of the woman alleging rape have held that it does.[345] Some courts have gone so far as to argue that the mere potential for a tort claim can be a basis of impeachment.[346] In America, there is, in general, "a widespread suspicion against plaintiffs and plaintiff lawyers," and "[i]n sexual assault cases, the suspicion bias is likely to be reinforced through powerful visceral responses to the plaintiff's case and based on the juror's own prejudices."[347] Impeachment on the basis that the complainant is a plaintiff in a civil case taps into this general suspicion bias, as well as the stereotypes of women lying about rape and commodifying sex.[348]

In a recent article, Tom Lininger exposes the gender bias behind this evidentiary rule and offers a compelling alternative framework to govern the admissibility of evidence regarding civil suits in criminal sexual assault trials.[349] It is hoped that such efforts will eventually render the criminal system less hostile to concurrent civil claims for the women who are able to access both systems.[350]

C. Access to Justice Issues

A significant obstacle to triangulated tort claims is the difficulty of accessing civil legal services.[351] Traditionally, little assistance has been

341. Lininger, *supra* note 11, at 1560.

342. *Id.* at 1594.

343. Orenstein, *supra* note 130, at 1604.

344. Lininger, *supra* note 11, at 1562.

345. *Id.* at 1591.

346. *Id.* at 1596.

347. William Friedlander & Alexandra Rudolph, *The Bias Beneath: Uncovering Juror Bias in Sexual Assault Cases*, PLAINTIFF MAGAZINE, June 2010, at 2.

348. Lininger, *supra* note 11, at 1550, 1585.

349. *Id*.

350. *Id*. at 1638.

351. *See* Bublick, *Tort Suits*, *supra* note 2, at 77 ("Perhaps the largest practical hurdle to direct litigation by the victim against the attacker is access to legal services.").

available to women initiating civil claims for sexual assault.[352] Federal rules often prohibit legal aid programs from offering services in tort actions, and the Legal Assistance to Victim grants are similarly encumbered.[353]

Indeed, accessing civil justice in the United States is problematic in general.[354] According to a World Justice Project report, the United States was second to last on a ranking of access to civil justice in high-income countries.[355] However, since triangulated claims usually involve a solvent third-party entity, prospective plaintiffs may actually have a relatively good chance of finding an attorney willing to pursue the matter on a contingency-fee basis.[356] Although factors like the degree of injury and the particular circumstances of the sexual harm may cause attorneys to be more inclined to take on certain types of clients over others, the presence of a "deep pocket" suggests that these cases will remain a viable option for some attorneys.[357] Ultimately, though, more low or no-cost options and services are needed in order to ensure that harmed women who want to bring these claims can do so.

VI.
CONCLUSION

The triangulated legal forms of sexual assault have evolved from the historical homosocial construction of rape as a wrong between two men based on the violation of one's proprietary interest in a woman, through the criminal triangulation of state versus man in pursuit of the public interest, and to a triangulation in which a harmed woman brings a civil suit on her own behalf, against the direct perpetrator of the harm and the third-party entity that contributed to its occurrence. Each of these triangulations has been deeply connected to the societies in which they developed, and each allows us to see the shifting parties and interests protected. The historical triangulation, for example, reflected a standard mode of patriarchal functioning. As society evolved, the state took over the role of the patriarch, and until the 1970s, the criminal system was virtually the sole place of rape redress. In the last forty years, as the feminist movement pushed for gender equality, female plaintiffs have begun to bring tort claims for sexual harms, against both the individual perpetrators and relevant third-party entities.

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352. Lois Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 254 (2005).

353. Bublick, *Tort Suits*, *supra* note 2, at 77.

354. MARK DAVID AGRAST, JUAN CARLOS BOTERO, & ALEJANDRO PONCE, THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 103 (2011).

355. *Id.*

356. Bublick, *Tort Suits*, *supra* note 2, at 77.

357. *See generally* Elizabeth Kuniholm, *Representing the Victim of Sexual Assault and Abuse: Special Considerations and Issues*, *in* ATLA ANNUAL CONFERENCE REFERENCE MATERIALS 1889, 1889 (2006), *available at* 2 Ann.2006 ATLA-CLE 1889 (Westlaw) (discussing the type of planning required for attorneys before taking on triangulated civil sexual assault claims).

By initiating triangulated civil claims against the perpetrators of sexual harm and the third parties that facilitate or fail to prevent rape, harmed women can achieve both private and public purposes. Because triangulated civil claims serve these dual purposes, they can function like crimtorts, and advance the private goals of compensation and acknowledgment while also creating social and systemic change. Through these claims, harmed women assert their individual dignity, and undergo a process of subjectivization that challenges the objectification inherent in the sexual harm and in the prior forms of legal redress for that harm. Further, by implicating the role of a third party in the occurrence of that harm, these claims expose the broader context in which such acts occur. They also help to regulate the important role that third-party entities play in the construction of the self, and in the gender system more broadly.

Tort liability for creating spaces and atmospheres conducive to sexual assault acts as a deterrent that may spur organizational change. Changes in policies and procedures will likely influence social norms, and make sexual harms less normalized. As a result, these third party claims may be able to effect widespread change. However, gendered notions of revenge, evidentiary rules of impeachment in the criminal context, comparative fault doctrines, summary judgment dismissals, and access to justice issues threaten to stifle the development of these claims. Fortunately, the growing body of persuasive scholarship confronting some of these hurdles, the continuing push towards gender equality, and the broadening sense of social responsibility in general suggest that these triangulated claims may not only endure, but may become more culturally accepted as an appropriate means of redress. As this process occurs, there will be less reliance on the criminal system as the exclusive arbiter of sexual harms, a move which will advance the project of disentangling feminism from the politics of the war on crime.